Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 8, 2001

QUESTION PRESENTED FOR REVIEW

Does respondents' policy, which continues a tradition of permitting student-led prayers at public high school graduations, violate the Establishment Clause of the First Amendment, where the decision on whether to have a prayer or other message is made by a student referendum and where, in practice, a substantial majority of such messages are in fact prayers?

LIST OF PARTIES TO THE PROCEEDING[1]

The petitioners, past and current students of respondents' public school system, and parents of minor students, are:

Emily Adler
Bonnie Bear
Aaron Finck
Benjamin Finck
Rachel Finck
Seth Finck
Tyler Hurley
Monica Juodvalkis
Lucy Nord
Roberta Nord
Jonathan Rand
Joshua Weihnacht

Petitioners' request for class certification was not ruled upon below.

Respondents are the Duval County School Board and Duval County Public School District, which operate the public school system in Jacksonville, Duval County, Florida.

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[1]A group of individuals sought to intervene in support of the respondents. Their motion to intervene was denied as moot by the district court and their intervention status was not addressed by the Court of Appeals. These persons are as follows: Rebecca Boles, Ronald Boles, Susan Boles, Ashton Carkhuff, Karlene Carkhuff, Kenneth Carkuff, Sarah Carter, Stan Carter, Susan Carter, Eric S. Hurst, Phillip R. Hurst, Mark Muhlbauer, Charlotte R. Pigg, Douglas D. Pigg, Jonathan D. Pigg, Jody Sciullo, Mark Sciullo, Moriah Sciullo, Nicholas Sciullo, H. Nelson Sturgill, and Kathy C. Sturgill.

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on May 11, 2001.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals after remand by this Court appears at App. 1a-48a of this Petition and is published at 250 F.3d 1330. The court's previous *en banc* opinion appears at App. 49a through 139a and is published at 206 F.3d 1070. The panel opinion of the Court of Appeals

appears at App. 140a through 224a and is published at 174 F.3d 1236. The unpublished order of the district court appears at App. 225a-228a. A previous opinion of the district court relating to the same policy of respondent, and adopted by the district court in this case, appears at App. 229a through 256a and is published at 851 F.Supp. 446.

JURISDICTION

Following a timely petition for writ of certiorari, this Court granted certiorari, vacated the prior *en banc* opinion of the Court of Appeals and remanded for reconsideration in light of the decision in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). *See Adler v. Duval County Sch. Bd.*, ___ U.S. ___, 121 S.Ct. 31, 148 L.Ed.2d 3 (2000). The Court of Appeals rendered its *en banc* opinion on remand on May 11, 2001. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (2001). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RESPONDENTS' POLICY INVOLVED

This case requires interpretation and application of the First Amendment to the Constitution of the United States. The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....

Respondents' policy at issue, entitled "GRADUATION PRAYERS," is reprinted in full at App. 267a-268a.

STATEMENT OF THE CASE

Invocations, benedictions and other prayers or religious messages traditionally have been offered at Duval County, Florida, public high school graduation ceremonies. *See* App. 246a n.9; *Adler I*, 851 F.Supp. at 453 n. 9. However, following the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), the respondents' legal affairs officer promulgated a July 22, 1992 policy that "there should be no prayer, benediction, or invocation at any graduation ceremonies" pursuant to *Lee*. App. 52a n.1; *Adler IV*, 206 F.3d at 1071 n.1. During the ensuing academic year, following pressure from various interest groups and individuals seeking to ensure continuation of prayer at graduations, the respondents' superintendent, as he later testified, determined "that it would be appropriate for students themselves at commencement to perform in the way of developing, administering, delivering the prayer at commencement." Deposition of Larry Zenke at 10-11.

Respondents' legal affairs officer then promulgated a May 5, 1993 policy entitled "Graduation Prayers," the policy at issue in this case, which delegates to the "senior class as a whole" to decide whether "a brief opening and/or closing message, not to exceed two minutes" would be given at graduations and, if so, which student would be chosen to deliver the "message." App. 267a-268a. The policy, reprinted in full at the end of the appendix to this Petition, App. 267a, was premised on its face on a contention that its procedures were lawful, despite *Lee*, in view of a Fifth Circuit opinion, not cited but acknowledged to be *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). App. 267a. The policy explains that its "purpose...is to give you [high school principals] some guidelines on this issue" of "whether or not student initiated and led prayers are acceptable" at graduation following *Lee*. App. 267a. On June 1, 1993, the respondent Duval County School Board rejected a proposed alternative

policy that would have substituted a moment of silence for the "Graduation Prayers" policy. App. 54a-55a; *Adler IV*, 206 F.3d at 1072. As one board member remarked during the debate, "[I]n good conscience I cannot vote [in favor of] silent meditation when we all know that in the past someone has prayed out loud to thank the Lord...." App. 38a; *Adler V*, 250 F.3d at 1346 n.3 (Kravitch, J., dissenting).

Pursuant to the policy, each high school's senior class or senior class officers vote in elections administered by the school administration and faculty to select a student to deliver the "message" or "messages." Votes often have been taken on the specific issue of whether to include prayer at graduation, and most frequently the speaker selected at most schools has been a previously elected class "chaplain."[1] In programs printed by respondents, graduates and audience members are directed to stand during explicitly labeled invocations and benedictions, as well as other less explicitly labeled messages, which, since enactment of the policy, have most often constituted prayers. *See* App. 262a -266a (summary of printed programs).[2] The audience is directed to stand for "messages"

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[1]The senior class chaplain is elected at the beginning of the academic year along with other class officers. The record does not reveal the other duties of the chaplain, if any. While the existence of a senior class chaplain may raise constitutional questions, that issue is not raised in this case.

[2]This is a table summarizing printed programs of numerous graduation exercises from 1994 through 1997 with respect to the description in the programs themselves of the "messages" delivered pursuant to the challenged policy and of the chosen speaker. The programs were obtained pursuant to Florida public records law prior to the filing of the lawsuit in this case. These programs, properly authenticated, were filed as exhibits in support of petitioners' motion for preliminary injunction in the district court, and this tabulation was furnished to both the district court at the hearing on that motion and the Court of Appeals as an appendix to petitioners' *en banc* reply brief. The respondents' production of materials in response to the pre-suit public records request did not include materials for all 17 high schools or for all years involved. Because the district court consolidated trial on the merits with the hearing on the motion for preliminary injunction pursuant to Fed.R.Civ.P. 65(a)(2), the record is not

delivered pursuant to the "Graduation Prayers" policy, but not for most other portions of the program, including the only other student speech by the valedictorian. *See* App. 115a-116a & n.7, 127a-128a & nn. 15-17, 137a & nn. 29-31; *Adler IV*, 206 F.3d at 1097 & n.7, 1102 & nn. 15-17, 1105-06 & nn. 29-31 (Kravitch, J., dissenting).

The petitioners seek declaratory, injunctive and damages remedies for violations of their rights under the Establishment Clause of the First Amendment by the adoption and implementation of respondents' "Graduation Prayers" policy for the 17 high schools of the Duval County, Florida, public school district. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3), and 42 U.S.C. §1983. The district court consolidated a hearing on petitioners' motion for preliminary injunction with trial on the merits, denied preliminary injunctive relief and entered final judgment for the respondents on the basis of its previous summary judgment in *Adler v. Duval County Sch. Bd.*, 851 F.Supp. 446 (M.D. Fla. 1994) *("Adler I"), aff'd in part, vacated in part*, 112 F.3d 1475 (11th Cir. 1997) *("Adler II")*.[3] App. 225a-228a. The district court took judicial notice of the *Adler I* record, which it consolidated with the record in this case. *See* App. 226a n.2.

The district court adopted its 1994 order on cross motions for summary judgment in *Adler I*. App. 227a. *See*

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flush with the results of discovery. Even this limited record, however, leaves no doubt of predominance of prayer as a result of the policy from 1994 through 1997. Respondents have never argued or produced evidence to the contrary.

[3]In *Adler II*, the Court of Appeals, after two arguments before different panels, did not address the constitutional merits but rather found equitable claims moot and damages claims waived. Even though the last name of the lead plaintiffs in all of these cases is the same, the case resulting in the *Adler I* and *Adler II* decisions involved students other than those who brought this case.

App. 229a, 190a; *Adler I*, 851 F.Supp. at 446. The district court concluded that respondents' policy does not violate the First Amendment, in critical part because of the student election mechanism and because of its conclusion that graduation ceremonies are limited public fora. App. 247a-248a; *Adler I*, 851 F.Supp. at 453-55. The district court also distinguished the case from this Court's decision in *Lee* on the basis of the rationale of *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). App. 251a-252a; *Adler I*, 851 F.Supp. at 455-56.

A panel of the Court of Appeals reversed the district court. App.140a; *Adler III*, 74 F.3d 1236. But the *en banc* court found that the "Graduation Prayers" policy "insulates" resulting prayers from state action because of the student vote mechanism. App. 63a-80a; *Adler IV*, 206 F.3d at 1075-84. The *en banc* majority also analogized the circumstances to those warranting a public forum analysis, App. 66a-67a & n.6; 206 F.3d at 1077-78 & n.6, and found the voting mechanism constitutionally neutral, App. 77a-82a, 206 F.3d at 1082-83. The majority below further concluded that the policy passes scrutiny under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 82a-99a; *Adler IV*, 206 F.3d at 1084-1090.

This Court granted certiorari, vacated the *en banc* judgment below and remanded for reconsideration in light of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). *Adler v. Duval County Sch. Bd.*, ___ U.S. ___, 121 S.Ct. 31, 148 L.Ed.2d 3 (2000). On remand from this Court, the majority below reinstated its previous *en banc* judgment and concluded that this case is "fundamentally different" from *Santa Fe* because of its belief that the student speech resulting from the Duval County policy does not constitute state action, prayer is not necessarily the only possible result of the policy's application on every occasion, and legitimate secular purposes exist for the policy. App. 9a, 24a-29a; 250 F.3d at 1334, 1340-42.

Four judges dissented on remand, concluding that the only differences between this case and *Santa Fe* are immaterial to the outcome, other than the fact that student attendance at graduations is *more* compulsory than attendance at football games, rendering a policy of prayer at graduations *more* offensive to the Establishment Clause. App. 30a, 41a; 250 F.3d at 1342 (Kravitch, J., dissenting); *id.* at 1347 (Carnes, J., dissenting). The initial *en banc* dissenting judges concluded that the student vote, and its results, are attributable to the state, that the strictures of the policy promote invocation and benediction prayer in a highly controlled school environment, that majority voting on the issue is not constitutionally neutral and that the preeminent purpose and primary effect of the policy are to advance and endorse religion. App. 101a-129a; 206 F.3d at 1091-1106 (Kravitch, J., dissenting). As the dissent observed, almost all of the printed graduation programs prepared by respondents for ceremonies from 1994 through 1998 utilize the terms "invocation" and "benediction" to identify the "messages," and most identify the student speaker selected by majority vote as the senior class "chaplain." App. 182a n.17, 137a n.31; 206 F.3d at 1102 n.17, 1106 n.31 (Kravitch, J., dissenting). The dissent concluded:

> [T]he policy encourages the delivery of a prayer during a stage of the graduation ceremony when the content seems most "official" and when officials' control over audience participation is at its highest....
>
> Moreover, the policy utilizes the vote to further its purpose, and in so doing corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not do itself, and constitutional rights are not subject to the whims of an electoral majority.

App. 138a-139a; 206 F.3d at 1106 (Kravitch, J., dissenting).

Judge Kravitch, joined in dissent on remand by Chief Judge Anderson and Judges Carnes and Barkett, also found that the majority had not followed *Santa Fe*'s command to consider the history and context of the policy, had ignored significant portions of the written policy itself, and had failed to recognize that majoritarian decisionmaking under the policy renders the resulting speech attributable to the state. App. 30a-40a; 250 F.3d at 1342-47. Judge Carnes, joined by Chief Judge Anderson and Judge Barkett, wrote separately to emphasize the coercion, state endorsement and absence of neutrality inherent in majority rule on the policy's clear subject matter of prayer at graduation. App. 41a-48a; 250 F.3d at 1347-50.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of significance throughout the United States regarding prayer at public high school graduation exercises. The *en banc* majority opinion below conflicts with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), and wrongly approves a clearly pretextual attempt to circumvent *Lee v. Weisman*, 505 U.S. 577 (1992). Additionally, the Courts of Appeals have reached conflicting conclusions on the issue in the wake of *Lee*.

1. The Court of Appeals' majority opinion cannot be reconciled or harmonized with this Court's decision in *Santa Fe*. The Duval County policy is no more neutral than Santa Fe's. Student prayer from the graduation podium pursuant to a state policy of majoritarianism is more coercive, and more imbued with state endorsement, than prayer at football games because of the greater compulsion for students to attend their high school graduation exercises. *See Santa Fe*, 530 U.S. at 311-12. The decision below also contravenes *Santa Fe* by utterly disregarding the Duval County policy's history and context in

failing to recognize that the clear purpose of the challenged policy is to preserve a tradition of prayer at graduation, attempting to hide behind a thin veil its actual purpose and causative effects.[4] *Id.* at 307-09, 315-16. The decision below conflicts with the Court's decision in *Santa Fe* on an important question of constitutional law which, absent review by the Court, will continue to recur throughout the nation. Accordingly, the Court should grant review in this case.

This case involves delegating a state-assisted, exclusive opportunity to speak to the outcome of government-sponsored student referenda. This delegation of state power not only fails to separate the state from what results, but may heighten the constitutional offense, particularly the reasonable perception of state endorsement of the results. Issues of fundamental constitutional rights may not be determined by majority vote. *Santa Fe*, 530 U.S. at 304-305; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The First Amendment precludes a majority from using "the machinery of the state to practice its religious beliefs." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Any state delegation of power to a religious majority must foreclose religious favoritism and require neutrality. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706, 709-10 (1994). Majority determinations do not provide constitutional viewpoint neutrality. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

The dissents below are fully consistent with the precedents of this Court in concluding that the referenda pursuant to the Duval County policy fail to separate the

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[4]The importance of considering the history and context of the state action challenged under the Establishment Clause is hardly new. For example, a state-created moment of silence in public schools, seemingly neutral on its face, failed to withstand attack where the record established that its purpose was to continue a tradition of prayer in schools despite previous decisions of this Court. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

resulting religious speech from state action and fail to constitute neutral selection criteria. *Santa Fe*, 530 U.S. at 305-08. Even where application of the policy might not result in a 100 percent rate of compelled student participation in religious worship, a policy enacted with the purpose and perception of school endorsement of student prayer violates the Constitution simply upon enactment. *Id.* at 314-16. The judgment below in this case contravenes these holdings of the Court.

The decision of the Eleventh Circuit also conflicts with this Court's principal holdings in *Lee v. Weisman*, 505 U.S. 577 (1992). The Court in *Lee* reiterated the constitutional prohibition of majority rule in matters implicating the Establishment Clause. *Id.* at 596. A *Lee* analysis demonstrates that respondents' policy results in state coercion of student participation in religious exercises by the state-sponsored majoritarian decisionmaking and the essentially required nature of attendance at a high school graduation which is controlled by the state. *See id.* at 592-94.

The Court of Appeals' majority read state control of graduations, found in *Lee*, out of any existence in this case and failed to address the prohibition on state coercion of participation in religious exercises. *See Lee*, 505 U.S. at 599; App. 113a-116a; *Adler IV*, 206 F.3d at 1096-97 (Kravitch, J., dissenting). The majority below also failed to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971), properly by ignoring the material facts. By contrast, the dissents were based on consideration of the record and correct application of controlling law. "The dominant reason for its [the policy's] passage was to keep prayer in graduation ceremonies," and the policy on its face betrays its preeminent purpose to advance religion, with secular justifications nothing more than insincere rationalization or mere incidental effects. App. 118a-119a; *Adler IV*, 206 F.3d at 1098 (Kravitch, J., dissenting). Additionally, the Court of Appeals' majority overlooked the

policy's "preference for religious expression despite the seeming neutrality of its terms," rendering its primary effect one of advancing or endorsing religion. App. 127a; 206 F.3d at 1101 (Kravitch, J., dissenting), *citing, inter alia, County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Moreover, the majority below erred in even drawing an analogy to the public forum doctrine because graduation ceremonies have never been considered public fora, and a public forum is not created by allowing a student majority to elect a single speaker. *Santa Fe*, 530 U.S. at 302-03; App. 130a-133a; *Adler IV*, 206 F.3d at 1103-04 (Kravitch, J., dissenting); *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471, 1478 (3rd Cir. 1996) *(en banc); Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (1998), *vacated as moot*, 177 F.3d 789 (9th Cir. 1999) *(en banc); Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 418 (5th Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992).[5]

As did the school district in *Santa Fe*, the majority opinion below

> [a]sks us to pretend that we do not recognize what every [Duval County] high school student understands clearly - - that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a [graduation ceremony] and that this [policy] is essential to the protection of students' speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing prayer.

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[5] Even in a limited public forum, participation determined by majority vote is unconstitutional. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

> Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.

Santa Fe, 530 U.S. at 315-16. The policy does not require or even suggest that the "messages" must be solemn. Respondents' policy creates and fosters a divisive majoritarian electoral process through which "[a]ll the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do." App. 44a; *Adler V*, 250 F.3d at ___ (Carnes, J., dissenting).

2. In limiting its grant of certiorari in *Santa Fe* to the issue of prayers at public high school football games pursuant to student referenda, the Court in essence denied review of the Fifth Circuit's disposition of the issue of prayers at graduation exercises pursuant to such referenda. The Eleventh Circuit's *en banc* decision in this case conflicts with and specifically rejects the Fifth Circuit's decision in *Santa Fe* on the issue of prayer at graduation. *See* App. 70a-72a n.7; *Adler IV*, 206 F.3d at 1079 n.7. In *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 819 (5th Cir. 1999), the court invalidated a policy under which students voted whether an invocation and benediction would be given at graduation and, if so, which students would deliver them. *Id.* at 812. The Fifth Circuit concluded that the policy lacked a secular purpose and had the primary effect of advancing and endorsing religion because it failed to prohibit sectarian and proselytizing prayers. *Id.* at 818. This Court declined review of that holding. ___ U.S. ___, 120 S.Ct. 494, 145 L.Ed.2d 381.

The opinion below also conflicts with the Third Circuit's decision in *ACLU of New Jersey v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996) *(en banc)*, invalidating a policy allowing prayer at graduations pursuant

to student vote. In *Black Horse Pike*, school officials adopted a policy entitled "religion at graduation exercises" which allowed students to decide by majority or plurality whether to have a student volunteer to deliver a prayer, whether to have a moment of reflection or whether to do nothing at all, and required that printed programs disclaim any connection with any presentation that may result during the high school graduation ceremonies. *Id.* at 1475. The Third Circuit rejected the school board's argument that the referendum rendered the issue a matter of free speech rather than one of state establishment of religion. *Id.* at 1477. "[W]e fail to see how this particular policy, addressed only to providing an option for continuing prayer at graduation after *Lee*, can be legitimized as promoting the free speech rights of the students." *Id.* at 1478. The *Black Horse Pike* court rejected the Fifth Circuit's *Jones* decision, found that the policy was enacted with a principally sectarian purpose and had the primary effect of advancing and endorsing religion. *Id.* at 1482-88. The Third Circuit concurred with the reasoning of *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995).

In *Harris*, the high school senior class decided by majority vote whether to include invocation and benediction during graduation ceremonies and, if so, who would deliver them. 441 F.3d at 452-53. The Ninth Circuit rejected the reasoning of *Jones* (upon which the district court relied in this case); found pervasive state involvement in the speech resulting from its policy despite arguments that the student referenda transformed the issue into a private speech; and concluded that the intent and primary effect of the state policy at issue was to advance religion in an environment coercive of students. *Id.* at 454-58.

The Ninth Circuit also subsequently rendered an opinion arguably in some degree of tension with *Harris*. However, that court's decision in *Doe v. Madison Sch. Dist. No.*

321, 147 F.3d 832 (9th Cir. 1988), *vacated and dismissed*, 177 F.3d 789 (9th Cir. 1999), upheld a policy that the Ninth Circuit panel deemed more neutral than any of the other policies reviewed by the Courts of Appeals. In *Madison Sch. Dist.*, the policy allowed for the selection of four speakers solely on the basis of their academic standing, even if the practice resulted in prayer at graduation, and the court concluded that academic standing was a neutral selection criterion.[6] 147 F.3d at 835. As a result of these decisions, a clear conflict among the circuits exists with regard to the issue of student-led prayer at public high school graduation ceremonies, and disparate conclusions on this important issue will persist throughout the nation absent review by the Court. Accordingly, the Court should review the decision of the Court of Appeals in this case.

Since 1993, respondents have conducted student referenda to elect speakers to deliver "messages," not to exceed two minutes, near the beginning and end of public high school graduation exercises. The duration and placement of this opportunity for a single elected student to speak is fully consistent with the tradition of invocations and benedictions at Duval County graduations, App. 47a, 250 F.3d at 1350 (Carnes, J., dissenting), which the district court described as traditionally and historically "familiar if not expected." App. 246a n.9; *Adler I*, 851 F.Supp. at 453 n.9. The record is replete with evidence of explicitly labeled invocations and benedictions, most often delivered by class "chaplains" elected to give the "messages" pursuant to the policy, with directions that students and the audience stand for these parts of the programs. *See* App. 262a-266a. Like policies of a number of public school districts around the nation, respondents' policy seeks to evade *Lee* by unconstitutionally

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[6]Respondents' high school graduations, as is common generally, include addresses by class valedictorians (and at times also by the salutatorians), but respondents additionally promulgated their "Graduation Prayers" policy with a different selection method and for a different purpose.

delegating to student majorities decisions that respondents could not constitutionally make themselves.

The record demonstrates that in the policy's first year, 1993, the "messages" delivered pursuant to the policy were prayers at ten of Duval County's 17 public high schools. App. 21a, 45a. *Adler V*, 250 F.3d at 1339; *id.* at 1349 (Carnes, J., dissenting) ("approximately sixty percent of the times when the policy has been applied, it has resulted in student-led prayer at graduation. Sixty percent is not perfection, but it is close enough for government work, and Duval County's 'Graduation Prayers' policy is government work."). The record information for more recent years, mostly in the form of graduation programs printed by the various high schools, indicates an overwhelming prevalence of prayer or other religious messages during the times reserved for the policy's student "messages." *See* App. 262a-266a. Of the 62 messages indicated in this portion of the record, 58 either were titled "invocation" or "benediction" or were delivered by a student "chaplain," or both; only four lacked a clear indication of religious intent or content.[7]

The respondents' policy is entitled "GRADUATION PRAYERS."[8] The preamble to the policy

> recall[s] that after the 1992 Supreme Court case of *Lee v. Wiseman* [sic], you received a memorandum from me instructing that because of the decision, we would no longer

---

[7]Even with seemingly neutral criteria, the state cannot remain "studiously oblivious to the effects of its actions" impinging Establishment Clause. *Santa Fe*, 530 U.S. at 307, n.21.

[8]While not controlling over the text, titles are "tools available for the resolution of a doubt." *Brotherhood of R.R. Trainmen v. Baltimore & O .R. Co.*, 331 U.S. 519, 526 (1947).

> be able to have prayers at graduation ceremonies. Most of you have recently been bombarded, as have I, regarding whether or not student initiated and led prayers are acceptable based on a recent Fifth Circuit opinion.... The key to the *Lee v. Wiseman* [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance....

App. 267a. On its face, the premise of the policy, its very purpose, is the furtherance of prayer at graduation through implementation by students. The "messages" authorized by the policy are limited to two minutes in length, at the beginning and/or end of the ceremonies, times uniquely suited and historically devoted to the traditional invocations and benedictions. *See* App. 38a, 47a; *Adler V*, 250 F.3d at 1346 (Kravitch, J., dissenting); *id.* at 1350 (Carnes, J., dissenting). Also, those in attendance are requested in school-printed programs to stand for these messages, further evidence of coercion and endorsement.

Respondents faced threats of lawsuits from both sides–"not about whether there would be student participation or a student message in general, but about whether there would be prayer." App. 47a; *Id.* at 1350 (Carnes, J., dissenting). The school board's response was

> to pass the buck to the senior class.... [I]n that way a majority of the senior class determines whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As

> whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As interpreted in *Santa Fe,* the Establishment Clause forbids that type of exercise of majority power. Government is not allowed to aid in the establishment of religion by giving a majority of students a proxy to use government power to do that which government itself may not do.

App. 47a-48a; *id.* at 1350 (Carnes, J., dissenting); *see also, Santa Fe,* 530 U.S. at 305-12.

* * *

The majority of the Court of Appeals failed to apply the Court's clear holdings in *Santa Fe* to the record facts of this case. The court below based its judgment on immaterial distinctions between this case and *Santa Fe,* and ignored *Santa Fe*'s command to accord proper consideration to the history and context of the respondents' policy. By so doing, the Court of Appeals fosters further conflict among the circuits by encouraging recurrence of similar policies and of the issue raised in this petition. For these reasons, the Court should grant review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: August 8, 2001

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (VOLUME I)

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[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 11, 2001
THOMAS K. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-2709

D.C. Docket No. 98-00460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-00460-CIV-J-IOC

EMILY ADLER, individually; on behalf of herself and all persons similarly situated, SETH FINCK, individually; on behalf of himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(May 11, 2001)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, BIRCH, DUBINA, CARNES, BARKETT, HULL, MARCUS, WILSON, KRAVITCH and COX*, Circuit Judges.**

MARCUS, Circuit Judge:

---

*Circuit Judges Kravitch and Cox elected to participate in this decision, pursuant to 28 U.S.C. § 46(c).

**Circuit Judge Susan H. Black did not participate in this decision.

On March 15, 2000, this Court ruled that Duval County's facially-neutral policy permitting high school seniors to vote upon the delivery by a student of a message entirely of that student's choosing as part of graduation ceremonies did not violate the Establishment Clause. Adler v. Duval County Sch, Bd., 206 F.3d 1070 (11th Cir.) (en banc), pet. for cert. granted and judgment vacated, 121 S. Ct. 31 (2000). Plaintiffs thereafter petitioned the Supreme Court for certiorari. Meanwhile, on June 19, 2000, the Supreme Court rendered its decision in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266 (2000),which invalidated a Texas school board's policy permitting students to vote upon the delivery of a "statement or invocation," subject to officials' approval, at each home high school football game. On October 2, 2000, the Court vacated our decision* and remanded it for further consideration in light of Santa Fe. The case was returned to us on December 19, 2000, and we proceeded to rehear the case en banc.

Having carefully reviewed the Supreme Court's opinion, and considered supplemental briefs from the parties and amici, we conclude that Santa Fe does not alter our previous en banc decision, and accordingly we reinstate that decision and the judgment in favor of Duval County. Nevertheless, we take this opportunity to explain why we believe that Santa Fe does not alter the outcome of this case. Simply put, after (as before) Santa Fe, it is impossible to say that the Duval County policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how

private the message or how divorced the content of the message may be from any state review, let alone censorship. Santa Fe does not go that far, and we are not prepared to take such a step.

I.

At the outset, it is helpful to summarize briefly the facts and analysis of our prior en banc opinion. The Duval County policy provides in relevant part:

> "1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

> The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

206 F.3d at 1072 (emphasis added). We defined the issue then before us as "whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause." Id. at 1073. Analyzing this policy under the Supreme Court's opinions in Lee v. Weisman, 505 U.S. 577 (1992) and Lemon v. Kurtzman, 403 U.S. 602 (1971), we concluded that the policy did not violate the Establishment Clause on its face.[1]

Although we offered multiple reasons for that decision, our Lee analysis turned on several key facts. First, we emphasized that under Duval County's policy school officials have no power to direct that a message (let alone a religious message) be delivered at graduation ceremonies, or control in any way the content of any message actually to be delivered. As we explained:

---

[1]We expressly declined to consider at that time any as-applied objection to the policy's constitutionality. 206 F.3d at 1073 n.4 ("We do not address any potential 'as-applied' claims raised below by Appellants."). Accordingly, we did not consider Appellants' objections regarding the policy's alleged application after 1993. Nothing in Santa Fe in any way affects that decision or supports consideration of Appellants' as-applied challenges now.

[U]nder the Duval County graduation policy ... neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy explicitly divorces school officials from the decision-making process as to whether any message -- be it religious or not -- may be delivered at graduation at all. Moreover, decisional control over the most crucial elements o@ - tie graduation policy rests with the students and not the state.... Under the policy, the School Board and its agents have no control over who will draft the message (if there be any message at all) or what its content may be. The School Board also does not suggest in any way, let alone require, that the graduating class consider religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker. And most notably, if the graduating class chooses to have a message, the content of the message shall be prepared by the student speaker alone and no one else. The Duval County School Board is expressly prohibited by the very terms of its policy from influencing or editing the message in any way. [The] decision [as to content] rests solely with the elected student speaker – with neither the senior class nor the school exercising any sort of editorial oversight. Therefore, on the face of the policy itself, the students unambiguously understand that any student message is utterly divorced from any state sponsorship.

206 F.3d at 1076.

Second, we rejected the argument that the state's role in providing a vehicle for a graduation message by itself transformed the student's private speech into state-sponsored speech. We accepted the assumption that the school board "exerted overwhelming control over the graduation ceremony," but stressed that the board "did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Id. at 1080.

We likewise rejected the argument that Duval County's policy would have the impermissible effect of coercing unwilling listeners to participate in a state sponsored religious exercise. As we explained:

> [N]either the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone "require" or "coerce" the student audience to participate in any privately-crafted message. While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor. We cannot assume ... that Duval County seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message -- particularly where the students are expressly informed as part of the election process

> that they may select a speaker who alone will craft any message.... No religious result is preordained.

Id. at 1084.

Citing these and other facts, we found as well that the policy met all three prongs of the Lemon test. We concluded that the policy had a secular purpose, including "affording graduating students an opportunity to direct their own graduation ceremony," and "permitting student freedom of expression." Id. at 1085. We also noted that the text of the policy did not reveal a religious purpose, and that the limited pieces of background evidence highlighted for the contention that the policy's secular purpose was a sham could not "strip the policy of [its] secular purpose. No matter what an individual board member may have hoped -- and they said nothing on the record about codifying this policy -- Duval County's policy is facially neutral and undeniably evinces a secular purpose." Id. at 1089. We closed our prior en banc opinion by defining our holding narrowly, stating that Duval County's policy of "permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause." Id. at 1091 (emphasis added).

II.

Three months after we issued our prior en banc opinion, the Supreme Court decided Santa Fe. By a 6-3

vote, the Court found that a school district policy permitting students to vote upon the delivery by a student of a "statement or invocation" prior to high school football games violated the Establishment Clause. Because the facts of Santa Fe are fundamentally different in many crucial respects from the facts of this case, they are worth presenting in some detail.

For a period of time leading up to and including the 1992-93 and 1993-94 school years, the Santa Fe school district allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. The prayers were characterized as "invocations" or "benedictions" for these events, and typically were given by officers of the student council. Similar prayers were recited by the student council "chaplain" prior to the start of football games.

In 1994, responding to the Supreme Court's decision in Lee. the district drafted a written policy that prohibited clerics from delivering invocations or benedictions at graduation ceremonies, but otherwise did not prohibit prayer at school functions. After graduation ceremonies that year, the district amended its written policy to say that a school "may permit the graduating senior class(es), with the advice and counsel of the senior class sponsor, to elect to choose student volunteers to deliver nonsectarian, non-proselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies." The same policy was adopted for football games.

In April 1995, several students and parents filed suit in federal court, in part to prevent the district from violating the Establishment Clause at imminent graduation exercises. In their complaint the plaintiffs alleged that the district engaged in other proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. Santa Fe, 120 S. Ct. at 2271-72.

In response to a court order, Santa Fe again revised its policies dealing with prayer at school functions. Policies enacted in May and July 1995 for graduation ceremonies provided the format for the District's August 1995 policy regarding high school football games. That August policy authorized two student elections, the first to determine whether an "invocation" should be delivered, and the second to select the spokesperson to deliver it. On August 31, 1995, according to the parties' stipulation, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games .... The students chose to allow a student to say a prayer at football games." A week later, in a separate election, they selected a student ... to deliver the prayer at varsity football games.'" Id. at 2273 (emphasis added).

Subsequently, in October 1995, the school district slightly modified the August policy. The October version of the policy was (in the Supreme Court's words) "essentially the same as the August policy, though it omits the word

'prayer' from its title, and refers to 'messages' and 'statements' as well as 'invocations.'" Id. The October policy provided in relevant part:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

120 S. Ct. at 2273 n.6.

After the Fifth Circuit held that both the August and October policies violated the Establishment Clause, the Supreme Court granted the District's petition for certiorari,

limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." Id. at 2275 (emphasis added). The Court did not propose to address, and did not address in its ensuing opinion, the district's graduation policies.

A majority of the Court found that the October policy violated the Establishment Clause. The Court analyzed the policy under the principle of Lee that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion. . . . '" 120 S. Ct. at 2275 (quoting Lee, 505 U.S. at 587). Initially, the Court determined that messages delivered by students pursuant to the policy would constitute state-sponsored speech rather than private speech. The Court offered essentially four reasons for that finding: (1) the student's speech would be authorized by a government policy that explicitly and implicitly encouraged one particular kind of message, see 120 S. Ct. at 2275, 2279; (2) it would take place on school property at a school event, see id. at 2275, 2278; (3) the government had broad power to regulate the content of the student's speech, see id. at 2276-77; and (4) the electoral system would yield only a single speaker and would completely prevent dissenting viewpoints from being heard, see id. at 2276-77.

Having found that student speech under the policy was, and would be perceived as, state-sponsored, the Court then found that the religious content of the "statement or

invocation" permitted by the Santa Fe policy was impermissibly coercive. The Court explained that "[t]he electoral mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games." Id. at 2280. The Court also reasoned that, even though the case was brought as a facial challenge, it was appropriate as part of the facial inquiry to consider the purpose of the policy. Id. at 2282 (citing Lemon). The Court stressed that "the text of the October policy alone reveals that it has an unconstitutional purpose," and added that the events leading up to the enactment of the October policy further conveyed the school board's purpose to ensure a place for prayer in school functions. Id. For these reasons, the Court concluded that the Santa Fe's football game policy was unconstitutional.

III.

In Santa Fe itself the Supreme Court reiterated just how case-specific Establishment Clause analysis must be under its precedent. As the Court explained:

> Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts .... Every government practice must be judged in its unique circumstances . . . ."

120 S. Ct. at 2282 (citation omitted). We spoke similarly in our prior en banc opinion:

> Establishment Clause jurisprudence calls for the difficult task of separating a student's private message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter. This determination is of "necessity one of line-drawing," see Lee, 505 U.S. at 598, "sometimes quite fine, based on the particular facts of each case," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). Indeed, our courts have recognized that "at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." See Lee, 505 U.S. at 598-99.

206 F.3d at 1074 (citations omitted).

The Court in Santa Fe did not attempt to sweep with a broad brush; rather, it found based on the facts then before it that Santa Fe's policy allowing students to elect a speaker to give a "statement or invocation" of plainly religious bent, at every single home football game, subject to content review by school officials and potential state censorship of non- or anti-religious messages, violated the Establishment Clause. The facts of this case are fundamentally different,

and in our view require exactly the same result today as they did at the time of our prior opinion.

A.

Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the Santa Fe policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message," Santa Fe, 120 S. Ct. at 2276; and (2) the policy, "by its terms, invites and encourages religious messages," id. at 2277 (emphasis added). Those two dispositive facts are not present here, and that makes all the difference.

First, the Duval County policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered. Indeed, school officials are affirmatively forbidden from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views:

> "If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees. [] The purpose of these

guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

206 F.3d at 1072 (quoting policy) (emphasis added). This is in sharp contrast to the Sante Fe policy, under which any message was subject to content regulation by the state. The Santa Fe policy dictated that the process of selecting a speaker and delivering the message was subject to the ... advice and direction of the high school principal.'" 120 S. Ct. at 2273 n.6. As part of that process, school officials were effectively authorized to review the message itself to ensure that it was ... "'consistent with the goals and purpose of th[e] policy.'" Id. The policy therefore created virtually no check on school officials' power to regulate the proposed student message, giving almost unfettered discretion to state officials acting under the guise of determining that the message would be "'appropriate.'" Id.

The ability to regulate the content of speech is a hallmark of state involvement, and the Supreme Court returned repeatedly to that theme in Santa Fe. The Court highlighted that "[t]he statement or invocation ... is subject to particular regulations that confine the content and topic of the student's message." Id. at 2276. The Court observed that "Santa Fe's student election system ensures that only those messages deemed 'appropriate' under the District's policy may be delivered." Id.; see also id. at 2279. And the Court expressly characterized the Santa Fe policy as "not a content-neutral regulation" because of its "content

restrictions." Id. at 2282; see also id. at 2277 (emphasizing that "the policy mandates that the 'statement or invocation' be 'consistent with the goals and purposes of this policy'" and that accordingly "the District has failed to divorce itself from the religious content of the invocations"). The ability of the state to regulate the content of the students' message was a critical factor in the Court's reasoning, and is indisputably not present in this case. Under the Duval County policy, if the senior class elects to have a message, the student elected to give that message is totally free and autonomous to say whatever he or she desires, without review or censorship by agents of the state or, for that matter, the student body. No reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.

Second, unlike Santa Fe's policy, the Duval County policy does not "by its terms, invite[] and encourage[] religious messages." 120 S. Ct. at 2277. On the contrary, the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message. Although the Supreme Court did not limit its analysis to the text of the Santa Fe policy, it placed heavy emphasis on the text's express and unambiguous preference for the delivery of religious messages.

> The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements

> that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an "invocation" -- a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message.

Id. The fact that the text of the Santa Fe policy expressed a clear preference for religious messages was a key factor in the Court's determination that student speech delivered pursuant to that policy would be viewed as state-sponsored. Id. at 2278-79; compare also id. at 281 ("[N]othing in the Constitution ... prohibits any public school student from praying .... But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.") (emphasis added). In this case, the text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme.

These important facts demonstrate why Santa Fe is distinguishable from this case, and more particularly why the speech at issue here -- unlike the speech contemplated by the Santa Fe policy -- cannot reasonably be described as state-sponsored. These key facts also help illustrate why the speech permitted by Duval County cannot reasonably be described as state "coercion" of religion.

The linchpin of the Court's analysis on this issue was its finding that Santa Fe's policy "subject[ed] the issue of prayer to a majoritarian vote." 120 S. Ct. at 2281; see also id. at 2283 ("Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred."). In essence, the Court found that the policy, by specifically permitting students to vote upon an "invocation" and authorizing school officials to ensure that any message proposed by the chosen student was "appropriate," made it virtually impossible for the election to be anything other than a referendum on conducting prayer. Indispensible to this analysis was the school district's unambiguous concession that the vote authorized by. the policy was indeed a vote up-or-down on prayer:

> The Chief Justice contends that we have "misconstrue[d] the nature ... [of] the policy as being an election on 'prayer' and 'religion.' We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver prayer

> at varsity football games," that the "students chose to allow a student to say a prayer at football games," and that a second election was then held "to determine which student would deliver the prayer."

120 S. Ct. at 2283 n.24 (citations omitted). There has been no such critical concession in this case, and it cannot plausibly be argued that, on its face, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony.

The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do not vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message. Santa Fe does not remotely state or suggest that the term "message" connotes prayer, nor could it plausibly give so narrow a meaning to so broad a term. Instead, the Court repeatedly focused on the Santa Fe policy's use of the additional term "invocation," and drew from that term and the school district's concessions the conclusion that Santa Fe's policy mandated a vote on prayer. See id. at 2277. Similarly, there is no suggestion in Santa Fe that the terms "opening" and "closing" as used in Duval County's policy connote prayer. Indeed, those terms did not even appear in Santa Fe's policy. Simply put,

"[w]hatever majoritarian pressures are attendant to a student-led prayer pursuant to a direct student plebiscite on prayer are not facially presented by the Duval County policy." 206 F.3d at 11083 (emphasis added).

Although it is possible that under Duval County's policy the student body may select a speaker who then chooses on his or her own to deliver a religious message, that result is not preordained, and more to the point would not reflect a "majority" vote to impose religion on unwilling listeners. Rather, it would reflect the uncensored and wholly unreviewable decision of a single student speaker. It cannot seriously be argued that Duval County's policy ensures that persons with minority" views will never prevail in the student electoral process, whether we define "minority" in this context as persons opposed to the delivery of student-selected speech at graduation, persons opposed to the delivery of religious messages generally, or persons opposed to the delivery of a religious message that does not coincide with their chosen faith. In fact, the limited record before us proves just the opposite; in seven of the 17 instances reflected in the record, students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message. 206 F.3d at 1083-84. Yet in Santa Fe, the Court rested its holding in large part on the assumption that "the majoritarian process implemented by the district guarantees, by definition, that minority

candidates will never prevail and that their views will be effectively silenced." 120 S. Ct. at 2276 (emphasis added).[2]

For all of these reasons, the private speech delivered by a student pursuant to the Duval County policy does not become state-sponsored as a matter of law simply by virtue of the logic of Santa Fe.

Santa Fe also does not alter the analysis under the three-part test of Lemon. Santa Fe only addresses one part of the Lemon test: whether the policy at issue has a secular purpose. 120 S. Ct. at 2282-83. The Court's treatment of this

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[2]In his dissent, Judge Carnes asserts that "[t]he majority of the senior class selects and endorses the message because the majority selects the messenger." Infra at 44. But we think Judge Carnes's core assumption -- that the student speaker is nothing more than a puppet to give voice to the student body majority's demands for prayer -- is deeply flawed. To begin with, it ignores the express language of the policy, which does not allow (indeed, forbids) any regulation of the content of the speech. Under Duval County's policy, the student is free to give whatever message he chooses, regardless of whether that message comports with the views on religion, school prayer, or any other subject held by the majority that elected him. Ignoring the language of the policy is particularly dangerous where, as here, we are considering only a facial challenge, in which the primary focus by definition must be the text. Judge Carnes's reasoning also takes no account of students' ability -- and willingness -- to exercise the free and untrammeled speech authorized by the policy. Graduating seniors are squarely on notice, from the very language of the policy, that any speaker they may choose will have complete autonomy over the message he eventually delivers at graduation. Students recognize this fact when voting in favor of a message, and the speaker himself recognizes that fact in choosing what kind of message to deliver. The notion that "the content of the message is censored in advance through the majority selection process," infra at 47, is as pessimistic about the exercise of First Amendment freedoms as it is hostile to the text of the policy.

issue, however, underscores the differences between the Santa Fe policy and this policy. As discussed above, the text setting forth the Duval County policy does not evince a religious purpose. The text of the Santa Fe policy unambiguously did precisely that, a fact upon which the Court placed great emphasis. Id. at 2282 ("the text of the ... policy alone reveals that it had an unconstitutional purpose").

The Supreme Court's additional discussion of circumstances surrounding enactment of the Santa Fe policy is not inconsistent with our prior en banc opinion. We did not decline to explore the background to the Duval County policy. On the contrary, we did so at considerable length, concluding that "whether standing alone or in concert, the evidence marshaled by the Appellants to allege that the policy's secular purpose was a sham "cannot strip the policy of a secular purpose." 206 F.3d at 1089; see generally id. at 1086-89. More to the point, we found specifically that the limited record before us did not permit us "to fairly infer the motivation of those who promulgated or distributed the policy." Id. at 1086. Obviously, nothing in Santa Fe resolves that inescapable threshold problem.[3]

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[3]Much of Judge Kravitch's dissent is devoted not to considering Santa Fe, but rather to disputing this Court's conclusion in its prior en banc opinion that the Duval County policy has a secular purpose. As we have emphasized, nothing in Santa Fe in any way affects our earlier findings on that issue, which were based on the unique record of this case. Of the dissent's remaining objections, only two points need be noted separately. First, contrary to the dissent's suggestion, our prior opinion did not turn on an assumption that the school district created a public forum at graduation.

Moreover, the circumstances at issue in Santa Fe were vastly different in several important respects. Among other distinctions, the final version of the Santa Fe policy was found to be nothing more than the product of repeated efforts by the school district to inject prayer and other religious activities into school events even after Lee. v. Weisman. See 120 S. Ct. at 2272-73; see also id. at 2279 (describing Santa Fe's policy as nothing more than a direct "evolution ... from the long-sanctioned office of 'Student Chaplain"'). In addition, in Santa Fe, school officials stated unabashedly that the policy was designed to permit a student vote for prayer at graduation. Quite simply, Santa Fe does not undermine our finding that Duval County's policy, on this record in this facial challenge, has a secular purpose.

B.

For the reasons we have discussed, the facts of Santa Fe are not so similar to the facts of this case as to require us to alter our prior decision. On the contrary, the differences

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We simply observed in passing that "[i]n one sense" such an analogy could be drawn. 206 F.3d at 1077. Second, contrary to the dissent's suggestion, we plainly did not reject the Appellants' facial challenge because it was premature. Instead, we expressly rejected that challenge on the merits. See id. at 1090-91. Finally, we observe that the dissent does not answer our discussion of the two critical distinctions between this case and Santa Fe (the absence here of content regulation and a policy that by its ten-ns invites religious messages). Although we certainly agree that those facts were not the only ones considered by the Court in Santa Fe, they were absolutely essential to the Court's decision, and simply are not present in this case.

between this case and Santa Fe are substantial and material. The only basis for us to alter our prior decision, therefore, would be if the Supreme Court had promulgated new rules of law that we failed to apply in our prior decision. The Court did no such thing, however. The analysis in Santa Fe proceeded under the very same framework of Lee and Lemon that we applied in our prior decision.

The Supreme Court did not rule that an election process itself is always incompatible with the Establishment Clause. Nor did it rule that a student elected to speak to the student body is necessarily a state-sponsored speaker. Rather, the Court stressed that it was not invalidating all student elections, but merely concluding on the facts before it "that the resulting religious message under this policy would be attributable to the school, not just the student." Id. at 2283 n.23.[4]

Second, the Court did not rule that, simply because the speech at issue is "authorized by a government policy and

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[4]The Court did remark that "student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic." 120 S. Ct. at 2276 (citing Board of Regents of Univ. of Wis. Svs.. v. Southworth, 120 S. Ct. 1346 (2000)). As noted above, however, the Duval County policy does not mandate a student election to determine by majority vote whether school facilities should be used to disseminate a religious message at graduation. The "expressive activities" as to which students vote -- whether to permit a student to deliver a message (totally unreviewable and uncensored by the state) at graduation, and who if anyone may deliver the message of his or her choosing -- are neutral.

took place on government property at a government-sponsored, school-related event" it always constitutes state-sponsored speech. On the contrary, the Court expressly acknowledged that "not every message delivered under such circumstances is the government's own." Santa Fe, 120 S. Ct. at 2275. What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message. Id. at 2275-76. But it is the element of potential censorship, and the attendant risk recognized by Santa Fe that non-religious messages (or messages hostile to religion) will be suppressed, that is conspicuously absent from the record of this case. Notably, in our prior en banc opinion, we explained how affording students the opportunity to vote on whether or not to have a message that would be entirely of the student's choosing bore no more the imprimatur of the state than the process of selecting a homecoming queen. 206 F.3d at 1082. Presented with a similar "prom queen" argument by the dissenters in Santa Fe, the Court gave as its only distinction "[t]he fact that the District's policy provides for the election of the speaker only after the majority has voted on her message...." 120 S. Ct. at 2276 n. 15. That distinction plainly does not exist in this case.

Third, our prior en banc opinion fully considered the purpose of the Duval County policy. Accordingly, the opinion is consistent with the Supreme Court's observation that "[o]ur Establishment Clause cases involving facial challenges ... have not focused solely on the possible applications of the statute, but rather have considered

whether the statute has an unconstitutional purpose." Id. at 2281.[5]

Finally, our conclusion that the purpose of Duval County's policy is secular did not turn entirely or even largely on our finding that one of the purposes of the policy is to "allow students to solemnize graduation." 206 F.3d at 1085. As noted above, we identified three genuine secular purposes driving the policy; permitting solemnization of this seminal education experience is only one of those purposes. In any event, the Court's own words demonstrate

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[5]In our prior en banc opinion we observed that "[a] facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid.'" 206 F.3d at 1083-84 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). We did not decide the appeal on that basis, however, and made that observation in connection with explaining why one of Appellants' arguments on a subject other than the purpose of the statute was more suited to an as-applied challenge. 206 F.3d at 1083 ("Appellants also assume that allowing the senior class to vote whether to have a graduation 'message' unrestricted in content and to select an autonomous student speaker will have the effect of coercing any chosen speaker into placating the majority's religious sensibilities by offering a sectarian message of which the majority approves. This argument is highly remote and speculative [and also] would be far better suited to an as-applied challenge . . . ."). Moreover, the Court did not hold that government action violates the Establishment Clause simply by virtue of the fact that it has a non-secular purpose along with one or more secular purposes. On the contrary, the Court reiterated that under the Lemon standard, a court must invalidate a statute only if it lacks ... a secular legislative purpose. "' 120 S. Ct. at 2282 (quoting Lemon, 403 U.S. at 612) (emphasis added). The Court viewed the Santa Fe policy as having a single, wholly religious purpose and no secular purpose. See, e.g., 120 S. Ct. at 2282. By contrast, in this case the plaintiffs did not establish -- and we did not find -- a sectarian purpose. Rather, we have found, after painstaking review of the entire record, that the policy had genuinely secular purposes.

that it was not purporting to declare that the desire to solemnize so important and isolated an educational event as a graduation ceremony is never a secular purpose. On the contrary, the Court merely said that "regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school." 120 S. Ct. at 2279. As discussed above, the Duval County policy does not call for an "invocation," and does not on its face sponsor prayer.

The issue before us today is extremely narrow: whether in light of Santa Fe we should alter our prior en banc decision in this case. We conclude that the answer is no. Indeed, by its reasoning Santa Fe reinforces the crucial point that "[t]he total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message [means] that the message delivered, be it secular or sectarian or both, is not state-sponsored." 206 F.3d at 1071.

The Court in Santa Fe had every opportunity to declare that all religious expression permitted at a public school graduation ceremony violates the Establishment Clause; it did not do so. We could not invalidate Duval County's policy, on its face, without taking the very step the Court declined to take. Santa Fe does not alter our prior en banc decision, nor does it erase the critical facts -- the complete

absence in the text of code words such as "invocation" unequivocally connoting religion, the policy's outright prohibition on state content review of non -or -anti-religious messages, the lack of any evidence (let alone stipulation as in Santa Fe) that students must vote up-or-down on prayer, and the sparseness of the record, to name a few -- that underlay our opinion. Accordingly, we reinstate our original en banc decision and judgment in favor of the County.[6]

OPINION AND JUDGMENT REINSTATED.

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[6]The Movants-'Intervenors' "motion to clarify intervention status" is denied.

KRAVITCH, Circuit Judge, dissenting, in which ANDERSON, Chief Judge, CARNES and BARKETT, Circuit Judges, join:

When the Supreme Court granted certiorari in this case and vacated this Court's en banc decision, it directed us to address the single issue whether the Duval County policy on graduation messages survives Establishment Clause scrutiny in light of the Supreme Court's decision in Santa Fe Indep . Sch. Dist. v. Doe, 530 U.S. 290 (2000). See Adler v. Duval County Sch. Bd., 121 S. Ct. 31 (2000). As a lower court, we are bound to follow rulings of the Supreme Court; thus our sole task today is to reevaluate the Duval policy in accordance with the legal principles enumerated in Santa Fe. A review of the Santa Fe decision and the record in this case convinces me that the Duval County policy is facially unconstitutional. Therefore, I respectfully dissent from the majority opinion reinstating this court's prior en banc decision.

In Santa Fe, the Supreme Court held that a school district policy permitting the student body to select by majority vote a student to deliver a "statement or invocation" prior to high school football games facially violates the Establishment Clause. 530 U.S. at 317. It further decided several corollary issues pertinent to our analysis here. First, the Court noted that the school district did not create a public forum by allowing a single student to deliver a statement or invocation prior to football games. Id. at 303 (stating that "selective access does not transform

government property into a public forum") (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n. 460 U.S. 37, 47 (1983)). This conclusion belies the assertion in this Court's prior en banc opinion that "[i]n one sense, the [Duval] policy can be analogized to a line of open forum cases in which the Supreme Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." See Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1077 (11th Cir. 2000) (en banc).

Second, the Court in Santa Fe flatly rejected the school district's argument that a facial challenge to the validity of the District's policy is premature until a student actually delivers a solemnizing message under the policy. See 530 U.S. at 313-14 (explaining that even if a student never delivers a prayer pursuant to the District's policy, a constitutional violation occurs by "the mere passage ... of a policy that has the purpose and perception of governmental establishment of religion"). The Supreme Court's decision on this issue negates the proposition in this court's prior en banc opinion that because the Duval policy does not by its terms guarantee that a prayer will be delivered at every graduation, a facial challenge to the policy is premature. See Adler, 206 F.3d at 1083-84. Despite the majority's position, the Supreme Court makes clear in Santa Fe that facial Establishment Clause challenges must not focus "solely on the possible applications of the statute, but rather [on] whether the statute has an unconstitutional purpose." Santa Fe, 530 U.S. at 314 (emphasis added). This Court's

prior en banc opinion states that "[a] facial challenge to be successful 'must establish that *no* set of circumstances exists under which the Act would be valid.'" Adler, 206 F.3d at 1083-84 (emphasis in original; citation omitted). What the opinion overlooks is that, under Santa Fe, if the Duval policy has an unconstitutional purpose, then there is no set of circumstances under which the policy would be valid, notwithstanding that some of the graduation messages delivered pursuant to the policy might be totally devoid of religious content. See 530 U.S. at 314.

Finally, the Santa Fe Court explicitly determined that the election mechanism in the District's policy did not render the policy immune to constitutional scrutiny. See 530 U.S. at 304-05 ("[S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic.... '[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.'") (citation omitted). The Supreme Court's decision on this issue renders untenable the majority's position that the Duval policy survives constitutional scrutiny because the school board "did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Adler, 206 F.3d at 1080. The majority's reasoning ignores the fact that Duval's "majoritarian election might ensure that *most* of the students are represented, [but] does nothing to protect the minority."

See Santa Fe, 530 U.S. at 305. Indeed, the very mechanism that the majority of this Court claims removes any impermissible coercion from the Duval policy serves to silence students espousing minority views, and forces them to participate in a state-sponsored exercise in which the message is determined by students holding majority views. The First Amendment does not permit such coercion. See id. at 317 ("Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majority vote, a constitutional violation has occurred.").

Although the policy at issue in Santa Fe and the Duval policy are not identical, their few distinctions are without significant differences, such that the Supreme Court's opinion in Santa Fe compels the conclusion that the Duval policy also facially violates the Establishment Clause. A minor distinction between the Santa Fe policy and the Duval policy is that the Santa Fe policy dealt with football games, whereas the Duval policy deals with graduation. This distinction is insignificant because the Supreme Court in Santa Fe implied that graduation prayers are more offensive to the Establishment Clause than are football game prayers because "we may assume that ... the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony." Id. at 311. A second distinction is that the Santa Fe policy allowed students to vote whether to have a "statement or invocation," whereas the Duval policy allows students to vote whether to have a "message." This too is a distinction

without a difference. Although a "message" is a more general type of address than an "invocation," the mere use of the less specific word "message" in its text will not shield Duval County's policy from Establishment Clause scrutiny, because such scrutiny must include an examination of the policy's purpose, history, and the context in which it was adopted to determine whether the policy has a permissible secular purpose or an impermissible religious one. See id. at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, it is nonetheless the duty of the courts to 'distinguis[h] a sham purpose from a sincere one.'") (citation omitted). "It is therefore proper, as part of this facial challenge, for us to examine the purpose of the [Duval] policy.... We [must] refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." Id. at 314-15.

The majority, by extracting the core policy from the remaining text of the memorandum promulgating the policy (the "Policy Memo"),[1] ignores the mandate of the

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[1]The Policy Memo was entitled "GRADUATION PRAYERS" and stated:

"You will recall that after the 1992 Supreme court case of Lee v. Weisman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or

Supreme Court that an evaluation of the purpose of a policy like Santa Fe's or Duval's is not complete without an examination of the context in which the policy was enacted. See id. at 308 ("The text and history of this policy, moreover, reinforce [the] objective student's perception that ... prayer is, in actuality, encouraged by the school."). By considering only the terms of the policy itself, the majority fails to address contextual evidence that evinces an impermissible religious purpose.

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closing message by a student.

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepare d by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees;

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials."

First, the Policy Memo is entitled "GRADUATION PRAYERS,"[2] Although a statute's title cannot limit or extend the statute's plain meaning, titles are "tools available for the resolution of a doubt." Brotherhood of R. R. Trainmen v. Baltimore & 0. R. Co., 331 U.S. 519, 529 (1947). Here, we are charged with resolving the issue whether the purpose of a school policy allowing student messages" at graduation is to endorse prayer at graduation. See Lemon v. Kurtzman, 403 U.S. 602, 612 (stating that in order to survive Establishment Clause scrutiny, a challenged provision must inter alia. "have a secular legislative purpose"). It is proper, therefore, for us to look to the Policy Memo's title in order to resolve any doubts we may have that the policy has a secular purpose. A policy with the word "prayer" in its title is more likely to have a religious purpose than a policy not similarly styled.

Second, the text of the Policy Memo indicates that the policy is intended as an "end run" around the law against state-sponsored graduation prayers set forth in Lee v. Weisman, 505 U.S. 577 (1992). The Policy Memo begins by stating that after Lee, the policy's author circulated a memo instructing that "we would no longer be able to have prayers at graduation ceremonies." The Policy Memo then presents the new issue "whether or not student initiated and

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[2]Interestingly, the policy that the Supreme Court struck down in Santa Fe did not contain the word "prayer," although earlier versions of the Santa Fe policy were entitled "Prayer at Football Games."

led prayers are acceptable" (second emphasis added), and states that "[t]he purpose of this memorandum is to give you some guidelines on this issue . . . " (emphasis added). The words "on this issue" can only mean prayer. This preamble to the Duval policy thus makes clear that the policy's purpose is to create a vehicle for the delivery of student-initiated-as contrasted with school-initiated-prayers at graduation. Indeed, the second paragraph of the policy's preamble states that the "key" to the Lee decision "was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by .permissive student choice and initiative" (emphasis added). The Policy Memo then 36 sets forth the Duval policy "with that premise in mind," which indicates that the policy's purpose is to endorse student-initiated rather than school-initiated prayers at graduation, not merely to allow students to deliver a generic message.

The Duval policy's purpose of endorsing student-initiated prayer at graduation is evidenced further by the discussion among school board members during the meeting in which the board rejected a proposal to institute a "moment of silent meditation" at graduation in lieu of the policy allowing student "messages." The transcript of that meeting, which contains seventeen instances of the words "prayer," "pray," or "prayed," conveys the context in which the Duval policy implicitly was adopted, and shows that the board adopted the policy in an effort to make prayer a part

of graduation.[3] Finally, the very terms of the Duval policy belie any purpose other than that of increasing the probability that graduation ceremonies will include prayer: the student "messages" are to be delivered at the beginning or end of the ceremony (a time typically reserved for prayers), and are to be no longer than two minutes (a duration consistent with a prayer).

Because the record reflects that the purpose of the Duval policy is to endorse prayer at graduation ceremonies, and because the scheme allowing the student majority to decide whether to include prayer does not cure the problem of the policy's impermissible, religious purpose, in my view the Duval policy fails to comply with the Supreme Court's directive in Santa Fe and thus facially violates the Establishment Clause. The majority attempts to escape this conclusion by emphasizing the fact that under the Santa Fe policy, the student election was to be conducted "[u]pon the advice and direction of the high school principal," and the student speaker's message was required to be "consistent with the goals and purposes of this policy," whereas the Duval policy placed no restrictions on the election, and stated that the student's message "shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees." These distinctions do not save the

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[3]For example, one board member remarked that "in good conscience I cannot vote [in favor of] silent meditation when we all know that in the past someone has prayed out loud to thank the Lord.....

Duval policy, however, because it was enacted for the impermissible purpose of increasing the probability that a prayer will be delivered at graduation, and because the majoritarian procedure for selecting a speaker ensures that minority viewpoints will be silenced, and that those possessing such viewpoints will be forced to participate in the majority's "message." The majority opinion concludes that there is no Establishment Clause violation in this case because, according to the majority, the Santa Fe Court relied mainly on two facts, which are not present here, in reaching its result: "(1) the speech [in Santa Fe] was 'subject to particular regulations that confine the content and topic of the student's message,' and (2) the policy, 'by its terms, invites and encourages religious messages.'" (citations omitted). It was not solely the existence of two facts, however, but rather a contextual analysis of the District's entire policy, including its history and purpose, that persuaded the Santa Fe Court that the policy impermissibly coerced students to participate in a religious exercise chosen by the majority of the graduating class.

Finally, the majority opinion makes the overbroad assertion that "it is impossible to say that the Duval County policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how private the message or how divorced the content of the message may be from any state review." This simply is not true. The Supreme Court emphasized in Santa Fe that "nothing in the Constitution as interpreted by this Court prohibits any public school

student from voluntarily praying at any time." 530 U.S. at 313; see also Adler, 206 F.3d at 1106 n.32 (Kravitch, J., dissenting) ("Nothing in this dissent suggests that all religious expression at a public high school graduation would run afoul of the Establishment Clause.... Audience members could pray quietly in their seats., and students could organize a prayer service immediately before or after the graduation ceremony."). Prayer at graduation does not by itself violate the First Amendment. If, however, "the 'degree of school involvement' makes it clear that the [graduation] prayers bear 'the imprint of the state,'" then a constitutional violation has occurred. See Santa Fe, 530 U.S. at 305 (quoting Lee, 505 U.S. at 590). A policy aimed at encouraging the delivery of a majority-selected prayer via the school's public address system at a "regularly scheduled, school-sponsored function conducted on school property," 530 U.S. at 307, does not merely facilitate the free exercise of religion; it promotes the establishment of the majority's religion,[4] and thus violates the Constitution. Therefore, respectfully I dissent.

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[4]4Because at graduation the majority-elected student delivers her message at a preordained point in a program planned by school officials who determine the place, time, attire, and all other aspects of the ceremony, "members of the listening audience must perceive the [student's] message as a public expression of the views of the majority of the student body delivered with the approval of the school administrations See Santa Fe, 530 U.S. at 308.

CARNES, Circuit Judge, dissenting, in which ANDERSON, Chief Judge, and BARKETT, Circuit Judge, join:

I join Judge Kravitch's dissenting opinion in its entirety and write separately to add a few points of my own.

When this case was last before us, I joined the majority opinion in large part because it reasoned, I thought correctly, that "[a] facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid,"' Adler v. Duval County School Bd., 206 F.3d 1070,1083 - 84 (I 11, Cir. 2000) (en banc) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095 (1987), and I was not convinced that had been established insofar as the Duval County policy is concerned. But the Supreme Court has now unequivocally held that principle of facial challenge law does not apply in the Establishment Clause area. Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 313-17, 120 S.Ct. 2266, 2281-2283 (2000). Since that prop has been knocked out from under our reasoning, and in light of the additional guidance the Santa Fe decision has given us, I am persuaded that the conclusion I reached before is wrong. The Duval County "Graduation Prayers" policy is facially unconstitutional under the Establishment Clause.

In discussing what we should do with this case in light of Santa Fe, the majority opinion approaches the matter as though the question were whether Santa Fe requires us to alter our prior en banc decision in this case. That approach

is weighted too heavily in favor of inertia. The question is less about what Santa Fe requires than it is about what the Establishment Clause, read in light of Santa Fe, permits. We are not bound in any respect by our prior, vacated decision, but instead are free to revisit any and all issues addressed in it. See Moore v. Zant, 885 F.2d 1497, 1501-03 (1989) (en banc). For that reason, we ought to spend less time comparing the factual and procedural details of the Santa Fe case to this one and more time considering the lessons that decision teaches.

One of those lessons is that a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do. Santa Fe, 530 U.S. at 304-12, 120 S. Ct. at 2276-80. We should apply that lesson to what we have recognized as the "elements which are most crucial in the Establishment Clause calculus." Adler 206 F.3d at 1080. We agreed when this case was last before us that the "most crucial" elements in our decision were "the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place." Id. It is undisputable that under the Duval County policy, whether there is a message and the selection of the messenger are decided by majority vote of the students in the senior class. That means those two of the three "most crucial" elements weigh against the constitutionality of the policy, because a school board policy may not authorize a student majority to do what the Establishment Clause prohibits the board itself from doing.

The other of what we termed the three "most crucial" elements of the Establishment Clause calculus is the content of the message. In our pre-Santa Fe decision, we took refuge in what we repeatedly described as the "autonomy" of the student-selected messenger, relying upon what we characterized as her "complete autonomy" over the message. See, e.g., Adler, 206 F.3d at 1071 ("the student speaker's complete autonomy over the content of the message"); id. ("how autonomous the speaker may be in crafting her message"); id. at 1074 (it "does not violate the Establishment Clause merely because an autonomous student speaker may choose to deliver a religious message"); id. at 1077 ("The graduation policy...allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis."); id. at 1079 ("and the student as complete autonomy over content"). That supposed autonomy is also a crucial premise of the reasoning in the present majority opinion. And a faulty one.

Santa Fe makes clear what should have been apparent all along: the messenger is not autonomous from the majority who chooses her any more than a political figure is autonomous from the majority who selects him. The majority opinion attempts to deal with this truth by characterizing the dissent as assuming that the popularly elected representative of the student majority will be "nothing more than a puppet to give voice to the student body majority's demands for prayer." Majority Op. at 21 n.2. I do not assume that any more than we assume that a

popularly elected official, selected after a one-issue campaign, will be no more than a puppet for the majority which elects him. The messenger need not be puppetized in order to serve the majority will. There will be among the majority of students who desire prayer at graduation any number of people who are more than happy to deliver the prayer themselves, just as there are some politicians who genuinely do believe in the same policies that they espouse in order to get elected.

The majority of the senior class selects and endorses the message because the majority selects the messenger. All the majority has to do to ensure that a religious message is delivered at graduation is select as its messenger one whom it can rely upon to give such a message. There is no reason at all to believe that will be difficult to do. The Supreme Court in Santa Fe presumed that there would be debate before each of two elections authorized by the policy of the school board in that case. See 530 U.S. at 310-11, 120 S.Ct. at 2279-80 ("The two student elections authorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere."). And there is no reason not to presume the same in this case. After all, that is how majority rule is typically exercised in a democratic setting. Issues are discussed and debated, and then a vote is taken to ascertain the will of the majority. Unlike the majority opinion, id. at 21 n.2. I do not think it is "pessimistic" to assume that election processes will result in selection of a representative who can be relied upon to carry out the will of the majority of those who vote. To the

contrary, faith in the notion that the majority can and will select representatives who will carry out its will is the optimistic assumption behind democracy.

It would be naive to expect the debate over the first question subjected to majority rule by the Duval County policy not to include discussion about whether there should be prayer. Prayer is what gave rise to the aptly named "Graduation Prayers" policy. Prayer is what a majority of people expect and usually want to hear at graduation. Once the majority will is expressed in favor of a student-delivered message, all the majority has to do to ensure that message includes prayer is select someone who can be counted upon to deliver a prayer. If there is any doubt about who will do so, that doubt can be resolved in the usual way that candidates' positions are identified in a democracy - through campaigning and debate. Insofar as we can tell, the policy seems to have worked as intended for the most part. Approximately sixty percent of the times when the policy has been applied, it has resulted in student-led prayer at graduation. Sixty percent is not perfection, but it is close enough for government work, and Duval County's "Graduation Prayers" policy is government work.

Duval County's "Graduation Prayers" policy may serve as a valuable teaching tool to show students how issues can be decided by majority vote and how representatives can be selected to carry out the will of the people. The problem is that because of the First Amendment religious issues are not supposed to be decided by vote of the people, and the

majority should not be allowed to force its religious views on those in the minority. Our Constitution ensures that when it comes to religion, it is the conscience of the individual rather than the will of the majority that rules. The lesson the students are being taught under the Duval County policy conflicts with the Establishment Clause.

The majority opinion concludes that no reasonable person attending a graduation ceremony could view the message the selected student delivers "as one imposed by the state." Majority Op. at 16. I believe that a reasonable person could view the message delivered by a student messenger, who is selected by a majority of the senior class to deliver the message, as one reflecting the views of the majority. And where a governmental unit, such as a school board, allows its power and authority to be wielded according to the will of a majority of students, the resulting message delivered on government property during a government-controlled event is the message of government. The government endorsement of the message comes not just from the setting in which it is delivered but also from the use of government-delegated power to select the messenger and message. The identity of the messenger is controlled and the content of the message is censored in advance through the majority selection process.

Judge Kravitch's dissenting opinion ably demonstrates that the purpose of Duval County's "Graduation Prayers" policy is consistent with its name. In disputing that, the majority opinion says the policy is not about prayer, but

instead is about student messages in general and permitting student participation in graduation ceremonies. Majority Op. at 7. I disagree. The policy is not entitled "Student Messages" or "Student Participation in Graduation," but "Graduation Prayers." There is nothing about a general student message or student participation that would cause the school board to dictate that it come at the beginning or end of the ceremony; that is, however, exactly when prayer traditionally occurs in a ceremony. And the board's mandate that the student "message" be no longer than two minutes comports nicely with the length of a good, short prayer. The memorandum that became the board's policy refers repeatedly not to free speech or democratic participation cases but to a school prayer decision. See Adler, 206 F.3d at 1072.

The "Graduation Prayers" memorandum refers to the board having "been threatened by lawsuits from both sides," id., and those threatened lawsuits were not about whether there would be student participation or a student message in general, but about whether there would be prayer. Even in our litigious society, no one sues about student participation in graduation ceremonies, but people do sue about whether prayer is allowed or prohibited at graduation and other school-related events. In response to the threats of lawsuits from both sides about whether there would be prayer at graduation, the school board sought to pass the buck to the senior class, thereby allowing the students, in the policy's words, "to direct their own graduation message without monitoring or review by school officials." Id. By

majority vote, the students direct their own graduation message by deciding whether there will be one and who will deliver it. And in that way a majority of the senior class determines whether its message will be prayer. The school board policy not just permits but invites that determination by the majority regardless of the views of the minority. As interpreted in Santa Fe, the Establishment Clause forbids that type of exercise of majority power. Government is not allowed to aid in the establishment of religion by giving a majority of students a proxy to use government power to do that which government itself may not do.

[PUBLISH]

FILED
U.S. COURT OF APPEALS
MAR 15, 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

98-2709

D. C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(March 15, 2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, CARNES, BARKETI, HULL, MARCUS, WILSON, Circuit Judges,* and KRAVITCH, Senior Circuit Judge.**

MARCUS, Circuit Judge:

At issue today is whether the Duval County, Florida school system's policy of permitting graduating students to vote on whether to select a student to deliver a message wholly of her own choosing at the beginning or closing of a high school graduation ceremony violates the Establishment Clause. Because the Duval County policy unambiguously recognizes the "crucial difference between government speech

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*Judge Susan H. Black did not participate in this decision.

**Senior U.S. Circuit Judge Phyllis A. Kravitch elected to participate in this. decision pursuant to 28 U.S.C. § 46(c).

endorsing religion, which the Establishment Clause forbids, and private speech [] [that may contain a prayerful message], which the Free Speech and Free Exercises Clauses protect," Board of Educ. v. Mergens, 496 U.S. 226, 250, 1 10 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (emphasis added), we find the policy constitutional on its face and affirm the judgment of the district court. The total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message convinces us that the message delivered, be it secular or sectarian or both, is not state-sponsored. To conclude otherwise would come perilously close to announcing an absolute rule that would excise all private religious expression from a public graduation ceremony, no matter how neutral the process of selecting the speaker may be, nor how autonomous the speaker may be in crafting her message.

I.

The facts of this case are straightforward, uncontroverted, and laid out fully by the district court in Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 448 (M.D. Fla. 1994) ("Adler I"). Invocations, benedictions, and other religious prayers or messages were traditionally offered, by clergy and others, at public high school commencement ceremonies in the Duval County School District. In 1992,

the Supreme Court in Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), held that a Providence, Rhode Island high school principal, acting in accord with school board policy, violated the Establishment Clause by inviting a local clergyman to deliver a nonsectarian prayer at graduation. In response to Lee, the Duval County Superintendent, Larry Zenke, at the behest of Vicki R. Reynolds, the school district's legal affairs officer, issued a memorandum instructing all school officials in the Duval County school system that no "prayer, benediction, or invocation" should be offered at "any graduation ceremonies."[1]

In the ensuing months, Superintendent Zenke received a number of letters from students and members of the community discussing the graduation policy. Some of these letters suggested that student-initiated, student-led prayer might be constitutional under Lee, and Zenke directed Reynolds to further research the issue. Reynolds later advised Zenke that it would be constitutional to allow student-initiated, student-led prayer during the graduation ceremony so long as the administration and faculty were not involved in the decision-making process. Zenke then authorized Reynolds to issue another memorandum (the "Reynolds Memorandum"), dated May 5, 1993, to all area

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[1]The memorandum, dated July 22, 1992, read, "[t]his memorandum is to remind you that due to the recent Supreme Court Ruling in Lee v. Weisman, there should be no prayer, benediction, or invocation at any graduation ceremonies.

high school principals. The memorandum was entitled "Graduation Prayers" and stated:

> You will recall that after the 1992 Supreme court case of Lee v. Wiseman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or closing message by a student.
>
> This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive. student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:
>
> 1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school

graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees.

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

This policy never was directly voted on or debated by the School Board.

Instead, at a June 1, 1993 School Board meeting, a motion was made to substitute a "moment of silence' for any student-initiated messages that might otherwise be given pursuant to the graduation policy announced in the Reynolds Memorandum. The motion failed by a vote of four to three. As a result, the Reynolds Memorandum was "left in force with the acquiescence or tacit approval of the Board as its official policy governing the 1993

commencement exercises." Adler I, 851 F.Supp. at 449. In 1993 under this policy, student speakers, at ten of seventeen high school graduation ceremonies, delivered some form of religious message. Notably, at the other seven graduations, there were no student messages at all or the messages were entirely secular in character. There is no tabulation in the record of comparable statistics for subsequent graduations.

In June 1993, various Duval County public school students sued the Duval County school system, alleging that the policy embodied in the Reynolds Memorandum constituted an establishment of religion and infringed on their free exercise of religion. These students sought equitable relief declaring the policy unconstitutional and enjoining the Duval County School Board from permitting prayers at high school graduation ceremonies as well as money damages. The students also sought to certify their action as a class action.[2] The district court denied the motion to certify the class and granted summary judgment in favor of the Duval County school system, holding that its policy was constitutional. See Adler I, 851 F.Supp. at 451-56. The students appealed, and a panel of this court found that because the students had all graduated, their claims for declaratory and injunctive relief were moot. See Adler v. Duval County Sch. Bd., 112 F.3d 1475, 1477-78 (11th Cir.

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[2]These original plaintiffs consisted of the following students: Leslie Adler, Laura Jaffa, and Robin Zion. Doug Rand later joined the action. Karen Adler and Robin Rand, the mothers of Leslie Adler and Doug Rand, were named as plaintiffs to bring the claims of their minor children.

1997) [hereinafter Adler II. The Adler II court also held that the students waived their damages claims on appeal. See Adler II, 112 F.3d at 1480-81. The Reynolds Memorandum thus remained the operative high school graduation policy for Duval County.

In May 1998, Appellants brought the instant action against the Duval County school system, again alleging that the policy embodied in the Reynolds Memorandum constituted an establishment of religion and infringed on their free exercise of religion. Appellants sought preliminary and permanent injunctive relief against the Duval County School Board to prevent it from permitting, conducting, or sponsoring any religious exercises or prayer and instruction within the Duval County Public School District, including at School Board-sponsored graduation ceremonies. Appellants also sought monetary damages and class certification.[3] The district court, at the hearing on Appellants' motion for a preliminary injunction and with the consent of the parties, consolidated the merits of Appellants' claims with Appellants' preliminary injunction

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[3]Appellants in the instant action include: Emily Adler, a June 1998 graduate of Mandarin High School; Seth Finck, a June 1998 graduate of Stanton College Preparatory School; Stella Finck, mother of Duval County public school students Rachel Finck, who was scheduled to graduate from Stanton College Preparatory School in 1999, Aaron Finck, who was scheduled to graduate from Stanton College Preparatory School in 2000, and Benjamin Finck, a Duval County public school student; Roberta Nord, mother of Duval County public school students Lucy Nord, age 9, and Tyler Hurley, age 12; and Jonathon Rand, a June 1998 graduate of Stanton College Preparatory School.

motion pursuant to Federal Rule of Civil Procedure 65(a)(2). The district court then denied Appellants' motion for preliminary injunction and entered final judgment in favor of the Duval County School Board.

Appellants filed a motion for expedited appeal and a panel of this Court heard oral argument on November 16, 1998. The panel reversed the district court's judgment and remanded for further proceedings. On June 2, 1999, we vacated this opinion and granted rehearing en banc.

II.

The central issue presented is whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause. [4]

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[4]We construe this appeal as the appeal of a final judgment strictly pertaining to the facial constitutionality of the Duval County graduation policy. We do not address any potential "as-applied" claims raised below by Appellants. This result is driven by the procedural history of the case. Initially, Appellants sought a preliminary injunction in addition to their facial and as-applied claims on the merits. At the pretrial hearing on the preliminary injunction, the district court indicated that it thought that Appellant's claims on the merits should be consolidated with the preliminary injunction motion because the claims were duplications of earlier claims it had evaluated in Adler I. The district court asked whether any operative facts had changed and the parties stipulated that there had been no substantive changes. As the district court explained:

> This is, for all practical purposes, the second time this case has appeared before this court In 1994 a similar group of Plaintiffs represented by the same counsel sought the same injunctive relief with respect to high school graduation or commencement ceremonies then scheduled to be conducted in the spring of that year. I decided at that time that the Plaintiffs' constitutional rights were not infringed. This action presents precisely the same claims predicated upon the same constitutional theories or contentions; and, at today's hearing, counsel stipulated that the operative facts remain unchanged. The only factual difference is that a new series of graduation ceremonies is scheduled for 1998. The present case was filed for the purpose of relitigating the issue upon the contention of Plaintiffs' counsel that the law has now evolved in their favor as manifested by [] [several] intervening decisions....

See Adler v. Duval County Sch. Bd., No. 98- 460-CIV-J-10C (M.D.Fla. May 27, 1998) (internal citation omitted) (emphasis added). The district court then took judicial notice of its opinion in Adler I and consolidated the action on the merits with Appellants' motion for preliminary injunction. Finally, the district court distinguished the intervening decisions cited by Appellants and concluded:

> [T]he proper decision in this case is dictated by the decision I reached in Adler I, and that the application for preliminary injunctive relief should be denied now as it was then. Furthermore, as counsel agreed during today's hearing, there is no just reason in fact or law as to why the action should not be advanced on the merits and consolidated with the hearing of the instant application so that final judgment may be entered and the controversy may proceed to the Court of Appeals.

Id. (emphasis added). Both parties consented to the consolidation and Appellants did not object to the effect this consolidation would have on their as-applied claims. Because of the consolidation, discovery was truncated as to the policy's application and effect for graduation ceremonies after 1993 and Appellants' as-applied claims were never fully developed or litigated below. Appellants' consent to the district court's consolidation constituted a knowing waiver of their as-applied claims, circumscribing the action and

Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause merely because an autonomous student speaker may choose to deliver a religious message. See Lee, 505 U.S. at 630 n.8, 112 S.Ct. 2649 (Souter, J., concurring) (observing that "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State") (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, L.Ed.2d 846 (1986)).

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the district court's final judgment to the facial constitutionality of the graduation policy. See Warehouse Groceries Management, Inc. v. SAV-U-Warehouse Groceries, Inc., 624 F.2d 655, 657-58 (5th Cir. 1980) (noting that district court, pursuant to Federal Rule of Civil Procedure 65(a(2), may properly consolidate the merits of a case with a preliminary injunction hearing so long as parties are given adequate notice); Fenstermacher v. Philadelphia Nat'l Bank 493 F.2d 333, 337 (3rd Cir. 1974) (noting that party's failure to object to district court's consolidation of the merits with a preliminary injunction hearing constituted a waiver of any defects stemming from the consolidation because the party had "acquiesced in the procedure followed in the district court'). We therefore restrict our review today to the facial constitutionality of the graduation policy.

Establishment Clause jurisprudence calls for the difficult task of separating a student's private message, which may be religious in character, from a state sponsored religious message, protecting the former and prohibiting the latter. This determination is of "necessity one of line-drawing," see Lee, 505 U.S. at 598, 112 S.Ct. 2649, "sometimes quite fine, based on the particular facts of each case," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 847, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (O'Connor, J., concurring). Indeed, our courts have recognized that "at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." See Lee , 505 U.S. at 598-99, 112 S.Ct. 2649 (citing Board of Educ. v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)). But at the core of Establishment Clause jurisprudence is the notion that the state may not favor, endorse, or oppose the propagation of religious doctrine by its citizens. In this case, the absence of state involvement in each of the central decisions-whether a graduation message will be delivered, who may speak, and what the content of the speech may be--insulates the School Board's policy from constitutional infirmity on its face.

We measure the facial constitutionality of the policy against both the standards enunciated by the Supreme Court in Lee, 505 U.S. 577, 112 S.Ct. 2649, the Court's only occasion to directly examine the issue of school prayer at a public high school graduation, and the more general

Establishment Clause test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).[5]

A.

In Lee, the Supreme Court scrutinized the Providence, Rhode Island public school system policy of permitting middle and high school principals to invite clerics to offer invocation and benediction prayers at formal high school graduation ceremonies. See Lee, 505 U.S. at 580, 112 S.Ct. 2649. In particular, the Court considered the 1989 graduation at Nathan Bishop Middle School where the principal invited a local rabbi to offer a religious invocation and benediction at the school's graduation ceremony. The principal also provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National

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[5] While the Lemon test has drawn considerable criticism from both Members of the Court and legal commentators, see, e.g., Board of Educ. v. Grumet, 512 U.S. 687, 721,114 S.Ct. 2481,129 L.Ed.2d 546 (1994) (O'Connor, J., concurring) (noting that "the slide away from Lemon!s unitary approach is well under way"); Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup.Ct. Rev. 323, 361 (1996) (declaring that "now that Lemon lacks any defenders on the Court, other judges would perform a shallow exercise were they to continue to apply its terms. They should recognize that the Supreme Court has definitely abandoned Lemon."), it is still binding precedent see Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7,113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (stating that "we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled"); see also Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1388 (11th Cir. 1993) (en banc) (explaining that "[a]lthough [the Lemon test] has been criticized severely, it still controls our Establishment Clause inquiry"); Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1468- 74 (11th Cir.1997) (applying Lemon)-

Conference of Christians and Jews, and advised the rabbi that the prayer should be nonsectarian. See id. at 581, 112 S.Ct. 2649.

In declaring the school system policy unconstitutional under the Establishment Clause, the Supreme Court pointed at two "dominant facts" as marking the boundaries of its decision: first, the Providence school officials ordained and directed the performance of a religious exercise by deciding to include prayer in the graduation ceremony, by selecting a clergyman to deliver the prayer, and by providing the clergyman with guidelines informing the content of the prayer; and second, pressure was exerted on students to attend graduation and conform with their peers by either standing as a group or remaining in respectful silence during the invocation and benediction. Id. at 586-88, 112 S.Ct. 2649. What the Supreme Court found striking and troubling about Lee was that the government clearly directed a formal religious exercise - -albeit in the form of a nonsectarian prayer--under such circumstances as to oblige the participation of many who objected. As Justice Kennedy wrote for the majority:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious

> activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586, 112 S.Ct. 2649. There can be little doubt, then, that in Lee the Providence, Rhode Island school system ordained and established a religious exercise at a graduation ceremony, and that the graduation prayer delivered by a rabbi was in every sense endorsed and supported by the state.

In striking contrast, under the Duval County graduation policy, however, neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy explicitly divorces school officials from the decision-making process as to whether any message--be it religious or not--may be delivered at graduation at all. Moreover, decisional control over the most crucial elements of the graduation policy rests with the students and not the state. According to the policy, school officials merely allow a graduating class to decide by an election whether to have a "brief opening and/or closing message" at graduation. If the class votes to have a message, it elects a student volunteer to deliver the message. That student is then free to deliver a message "not monitored or otherwise reviewed" in any way by the school. Under the policy, the School Board and its

agents have no control over who will draft the message (if there be any message at all) or what its content may be. The School Board also does not suggest in any way, let alone require, that the graduating class consider religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker. And most notably, if the graduating class chooses to have a message, the content of the message shall be prepared by the student speaker alone an no one else. The Duval County School Board is expressly prohibited by the very terms of its policy from influencing or editing the message in any way.

These operational features distinguish the Duval County policy from approximating even an arguably similar level of state control to the graduation policy struck down in Lee. Unlike the Providence policy in Lee, the Duval County policy, in no way, authorizes a school to "direct the performance of a formal religious exercise." Lee, 505 U.S. at 586, 112 S.Ct. 2649. And unlike a direct student plebiscite on graduation prayer, not even the senior class exercises control over the content of the graduation message. That decision rests solely with the elected student speaker-- with neither the senior class nor the school exercising any sort of editorial oversight. Therefore, on the face of the policy itself, the students unambiguously understand that any student message is utterly divorced from any state sponsorship.

Lee does not stand for the proposition that all religious expression, even the private religious expression of an

elected student speaker, must be excised from public high school graduation ceremonies. Rather, Lee prohibits the state from ordaining, directing, endorsing, or sponsoring a religious message at such ceremonies but not from adopting neutral secular policies which simply permit the possibility of private religious expression. See id., 505 U.S. at 589, 112 S.Ct. 2649 (observing that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State"); id. at 604-05 (Blackmun, concurring) (explaining that "[t]he Establishment Clause proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'") (quoting County of Alleghanv v. Greater Pittsburgh ACLU, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d. 472 (1989)); see also Agostini v. Felton, 521 U.S. 203, 231, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (noting that there is no advancement of religion where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"); Rosenberger, 515 US. at 839, 115 S.Ct 2510 (stating that ([a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); Grumet, 512 U.S. at 696, 114 S.Ct. 2481 (declaring that "'fa] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion'") (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93, 93 S.Ct. 2955, 31 L.Ed.2d 948

(1973)); Chandler v. James, 180 F.3d 1254, 1258-59, (11th Cir. 1999) (noting that "ordinarily religious speech by private parties cannot establish religion, even if it occurs in a public institution, such as a school") (citation omitted).

The School Board's policy is perfectly consistent with the theme of neutrality in Establishment Clause jurisprudence. As Justice Souter explained in his concurrence in Lee:

> While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community....

Lee, 505 U.S. at 627, 112 S.Ct. 2649 (internal citations omitted). No feature of the Duval County policy favors or endorses religion. The graduation policy is simply content-neutral, and allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis.

In one sense, the policy can be analogized to a line of open forum cases in which the Supreme Court has held that

neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion.[6] First, in Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court struck down a University of Missouri regulation that denied "equal access" to school facilities for religious groups as a violation of the Free Speech Clause. Id. at 274-75, 102 S.Ct. 269. In so ruling, the Court explained that an "open forum" policy, which permitted access to both religious and secular student groups in a neutral manner, did not offend the Establishment Clause because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" anymore than such a policy "'committed [the University] to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." Id. at 274, 102 S.Ct. 269 (citation omitted).

The Supreme Court extended this reasoning to public secondary schools in Mergens. There, the Court upheld the constitutionality of the Equal Access Act, 20 U.S.C. § 4071 et seq., which explicitly codified the reasoning of Widmar by prohibiting public secondary schools in receipt of federal

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[6]For purposes of our decision, we find it unnecessary to decide whether the Duval County graduation policy creates a "designated public forum" or a "nonpublic forum" as these terms have come to be defined by our public forum caselaw. See Arkansas Educ. Tele. Comm'n v. Forbes, 523 U.S. 666,118 S.Ct. 1633,1641-43,140 L.Ed.2d 875 (1998). We rely on public forum doctrine only in so far as it informs Establishment Clause jurisprudence regarding principles of state endorsement and neutral accommodation towards private religious speech.

funds from denying student access to "limited open forum[s]" on the basis of the religious content of their speech. Mergens, 496 U.S. at 235, 110 S.Ct. 2356. The Court elaborated a core tenet of its neutrality jurisprudence in the process:

> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.... Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.

Id. at 250-52, 110 S.Ct. 2356. In recent years, the Court has reaffirmed this principle by finding that the inclusion of private religious groups in "open forums" through neutral selection principles does not violate the Establishment Clause or constitute a state endorsement of religion. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality opinion) (concluding that the allowance of a private

religious display in an open public forum, selected by the same application process and on the same terms as other private displays, did not amount to state endorsement); Rosenberger, 515 U.S. at 832, 115 S.Ct. 2510 (holding that a public university subsidy for a religious student organization's publication costs, under a program that funded other student organization publications through neutral selection criteria, did not violate the Establishment Clause); Lamb's Chapel,. 508 U.S. at 395, 113 S.Ct. 2141 (finding that a policy, which allowed private student religious groups equal after-school access to school property through neutral secular criteria, would not violate the Establishment Clause).

These cases strongly suggest that a policy, like the Duval County graduation policy, which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression. Government neutrality towards religion is all that is required by the Establishment Clause. And it is worth emphasizing that while the state must be neutral and cannot advance or endorse religion, similarly, it need not, indeed it cannot, act in a hostile manner in the face of private religious speech publically uttered. See Lee. 505 U.S. at 598, 112 S.Ct. 2649 (observing that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution') (citation omitted); Zorach v. Clauson, 343 U.S.

306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (stating that "we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

In essence, this case is substantially like Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), vacated on other grounds , 177 F.3d 789 (9th Cir. 1999) (en banc) (vacating for mootness because the student plaintiffs already had graduated). In Doe, the Ninth Circuit examined a graduation policy which mirrors Duval County's policy in its neutrality. The Doe policy allowed for a minimum of four student graduation speakers to be selected according to their academic standing. If a student accepted the speaking invitation, she could choose to deliver an "address, poem, reading, song, musical presentation, prayer, or any other pronouncement" -- the content, of which, she alone controlled. Doe, *147* F.3d at 835. The Doe court upheld the constitutionality of the policy against a facial challenge on Establishment Clause grounds and distinguished Lee. It explained that graduation speech does not bear the imprimatur of the state when the speaker is a student, not a cleric; the student speaker is selected on neutral and secular criteria; and the student has complete autonomy over content. Doe, 147 F.3d at 835-36.[7]

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[7]The other federal circuit cases that have considered student-led, student initiated prayer at graduation are of limited assistance. All of these cases involve direct student plebiscites on graduation prayer. Of these

cases, Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), is the only one which has permitted students to vote directly on whether to have prayer at graduation. In Jones, the Fifth Circuit upheld the Clear Creek, Texas school district's policy allowing graduating students to vote whether student volunteers would deliver "nonsectarian and nonproselytizing" invocations at graduation. The court found: that the Clear Creek policy (1) reserved to the students the decision whether to have an invocation, (2) precluded anyone but a student volunteer from delivering an invocation, and (3) placed less psychological coercion on the student audience than the prayers given in Lee because students were aware that any prayers given represented the will of their peers. See id. at 970-71.

Both the Third and Ninth Circuits have come to an opposite conclusion. In ACLU of New Jersey. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (en banc), the Third Circuit, sitting en banc, held as unconstitutional a school board's policy that permitted the senior class to vote on whether to include a prayer at high school graduation ceremonies. See id. at 1477-88. The policy in Black Horse Pike allowed senior class officers to conduct a poll of the graduating class to determine, by plurality vote, whether seniors wanted "'prayer, a moment of reflection, or nothing at all'" to be included in their graduation ceremony. Id. at 1475 (citation omitted). In Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995), high school students themselves, pursuant to a school district policy, planned every aspect of their graduation, without interference from school officials, and voted by written ballot on whether or not to have prayer. The Harris court found that the state involvement in the case was pervasive enough to offend Establishment Clause concerns, noting that "[t]he message of the speakers is [] chosen by the majority; the relevant speakers are instructed to pray." Id. at 456-57.

In contrast to each of these policies, Duval County students vote on whether to have a message of unspecified content delivered by a student. This is a meaningful distinction.

The Fifth Circuit recently revisited the issue of student-initiated prayer in Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir.), cert. granted in part, 118 S.Ct. 494 (1999). There, the Fifth Circuit examined what it considered to bathe holding of Jones--"that student-selected, student-given, nonsectarian, nonproselytizing invocations and benedictions at high school graduation ceremonies" are constitutional--and concluded that the

Appellants, however, advance two arguments for why we should regard a student-selected graduation speaker, who is selected through a wholly neutral process and who is given complete autonomy over the content of her speech, as a public, state-sponsored speaker. First, they contend that by providing the platform and opportunity, the state has created a sufficient link to the student speaker to convert the student's private speech into public, state-sponsored speech. Second, they suggest that the majoritarian process of selecting the speaker shrouds the otherwise private speech

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constitutionality of a student-selected, student led prayer policy depends on its "nonsectarian and nonproselytizing" features. Id. at 816-19. The Santa Fe court also struck down a school policy which allowed student-led, student-initiated prayer before high school football games. The Supreme Court recently has granted certiorari in Santa Fe. However, the Court has limited its review to whether student-led, student initiated prayer at football games violates the Establishment Clause. The Court did not grant certiorari on the constitutionality of the Santa Fe graduation policy. Appellants cite Santa Fe for the proposition that a policy which "permits" sectarian and proselytizing prayers, is facially unconstitutional. As discussed in greater detail infra, this argument proves too much and is offensive to the Constitution. The Duval County policy, of course, permits sectarian and proselytizing prayers because it places no limitations, either secular or sectarian, on the content of a graduation message. A policy of free expression is far more consonant with the commands of the First Amendment than is a policy of censorship. See, e.g., Mergens, 496 U.S. at 253 (stating that "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur'); Santa Fe, 168 F.3d at 829-35 (Jolly, J., dissenting).

argument--that by providing the platform, the speech becomes public--goes too far. The second argument--that the speaker somehow gainers state authority by virtue of the plebiscite--has no logical rationale.

First, we reject the notion that the religious content of speech at a graduation ceremony is attributable to the school merely because of the school's sponsorship of the event or its control over the graduation's schedule, timing, decorum, or sequence of events. The Supreme Court did not suggest in Lee that school sponsorship of the graduation event, standing alone, was sufficient to find the Providence policy unconstitutional, or it would have banned all religious expression at graduation. If Appellants were right on this point, graduation speakers as diverse as athletes, politicians, academics, entertainers, and maybe even judges would bear the imprimatur of the state because they were handpicked by the school (or, in our case, elected by the senior class) to speak at an event over which the school has great control. Schools then would have to prevent these speakers from discussing a religious topic, engaging in prayer, or imploring the guidance of the Lord, to ensure no Establishment Clause violation and protect themselves from 42 U.S.C. § 1983 liability should an audience member perceive the school to be endorsing the speaker's religious message. Indeed, the same logic would apply to a student graduation speaker selected by other neutral criteria such as academic achievement. But a graduation free of all religious expression, compelled by the school's sponsorship of the event is not required by the Establishment Clause.

Even if we accept that the Duval County School Board exerted overwhelming control over the graduation ceremony in terms of the event's sequence, venue, dress, and facilities, it is clear that it did not have control over the elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place. It is beyond imagination to say that everyone on the platform at a high school graduation ceremony, including a local politician or celebrity, is a state speaker merely because the state has provided the platform, onto which private individuals may be invited to share their privately-held views. Such views do not become the state's views merely by being uttered at a state event on a state platform. Otherwise, each "open forum"case in which the Supreme Court found that granting religious groups access to generally available public facilities or benefits through neutral selection criteria was not an unconstitutional state endorsement of religion would be wrongly decided. See Pinette. 515 U.S. at 762-70, 115 S.Ct. 2440; id. at 772-83, 115 S.Ct. 2440 (O' Connor, J., concurring in the judgment); id. at 783-94, 115 S.Ct. 2440 (Souter, J., concurring in the judgment); Rosenberger, 515 U.S. at 839-46, 115 S.Ct. 2510; Lamb's Chapel, 508 U.S. at 395-97, 113 S.Ct. 2441; Mergens, 496 U.S. at 248-53, 110 S.Ct. 2356; Widrnar, 454 U.S. at 271-79, 102 S.Ct. 269. For by Appellants' logic, the mere provision of a state-controlled forum or subsidy to private speakers automatically converts private speech into government speech.

In addition, a per se rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech clauses. See Chandler, 180 F.3d at 1261 (stating that "[b]ecause genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and Free Speech Clauses of the Constitution"') (emphasis added). Even if we were to construe a graduation ceremony as a "nonpublic forum," Duval County students still would possess free speech rights there. The Supreme Court has consistently held that in nonpublic fora the government may not engage in viewpoint discrimination. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct 3439, 87 L.Ed.2d 567 (1985) (finding that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral") (emphasis added); Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (observing that "the state may reserve [] [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). The Court has also concluded that religion is a viewpoint which, for First Amendment purposes, may provide "a specific premise, a perspective, a standpoint from which a variety of subjects may be

discussed and considered." Rosenberger, 515 U.S. at 831, 115 S.Ct. 2510.

Presumably, a student's religious perspective would inform his views on a variety of subjects ordinarily dealt with at graduation such as expressing gratitude to his family or religious community, reflecting on the meaning of his school experience, or defining his future goals. The extremely personal and subjective nature of such views helps to explain why the School Board policy yields private rather than public speech. To unnecessarily classify student speakers as government actors could render Duval County students powerless to express religiously-inspired or religiously-influenced opinions at graduation. It also would effectively compel the Duval County School Board, if it wants to have any speech on topics where religion might motivate opinion or mould perspective, to engage in viewpoint discrimination, "an egregious form of content discrimination," Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510, in the name of secular purity.

The expression of religious beliefs, which are sacred to some listeners, may be offensive to others. Appellants' desire to insulate students and other attendants at graduation from the offense that they may well experience at hearing religious expression with which they strongly disagree is altogether understandable. Graduation ceremonies are designed to be joyous occasions for the celebration of student achievement. But the Constitution does not prohibit the exercise of offensive speech at

graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion. While the School Board is under no compulsion to provide an opportunity for free expression by one or more students at a graduation ceremony, the Constitution certainly does not prohibit the School Board from doing so. The occasional tolerance of speech we may deem offensive is one price we pay for the First Amendment and our democratic traditions.

Second, we reject the claim that allowing students to vote for a graduation message and to select the student speakers automatically places the imprint of the state on the student speakers' privately-crafted messages. Appellants' leap of logic, taking a selected student representative and, without explanation, turning her into a state actor by virtue of a democratic student vote, strains credulity. At most, a student speaker selected by a class vote is a representative of the student body, not an official of the state. She has no power or authority or official capacity to inform, carry out, or guide state policy. It is wholly unconvincing to argue that the student becomes a state actor because she was chosen by her peers, unless each high school student individually is considered to be a state actor, or somehow the students, acting in concert, come to be vested with the power of the state.

Consider two examples. First, consider the case of the selection of a Homecoming Queen. While she may be selected by a vote, or plebiscite of the entire senior class, the Homecoming Queen cannot be characterized as a state

actor, or a representative of the state, merely because she holds a "public" position and sits atop the Homecoming float. Imagine, second, the example of replacing the traditional valedictory address with the practice of affording the students of the graduating class the opportunity to select the graduation student speaker through a vote by the entire class. In this hypothetical, the student speaker is selected, not by the School Board on the basis of grades, but by the students on the basis of student choice – be it popularity, ability to entertain, achievement in athletics, or for some other reason. Again, it strains reason and common sense to suggest that, by virtue of her selection by the majority of the senior high school class, the student speaker becomes a mouthpiece of the state. Both examples suggest that the senior class's act of voting does not, in any way, turn the senior class vote into state action, nor turn the chosen student into a state actor. Because Duval County policy utilizes this same methodology, affording the students of the senior class the opportunity to vote whether or not to have a message and to select a student speaker, in a wholly secular way, the graduation message vote is no more vested with the imprimatur of the state than are the votes for graduation class speaker or Homecoming Queen.

While the line between "what is 'private' action and what is 'state' action is not always easy to determine," Appellants have in no way proven that the students' private conduct has become so "entwined with government policies" or so "impregnated with governmental character" as to become subject to the constitutional limitations placed

on state action. Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)). All of the policy's central decisions -- who speaks, whether there will be a speaker, and what the content of the speech may be -- are uncontrolled by the state. Indeed, the Duval County policy itself states that its purpose is "to allow students to direct their own graduation message without monitoring or review by school officials." The mere delegation of decision-making to pick a speaker alone does not place the state's imprint on a graduation prayer delivered by an autonomous student speaker who is free to give a message of unrestricted content.

In fact, the state's only involvement in the graduation message is to provide students with the opportunity to vote, to impose a time limit of two minutes, and to direct that the message be delivered at the beginning and/or closing of the ceremony. If the senior class were asked to vote whether to have a student deliver a poem or sing a song at their graduation exercise, under the same time and sequence restraints of the Duval County graduation message policy, that act still would involve the selection of a private, autonomous speaker through a neutral criterion. The Duval County policy does nothing more. It simply creates a neutral mechanism whereby the students can elect to have an unrestricted message and select a student speaker.

These facts do not establish that the state has so insinuated itself into the decision so as to transform an

elected student's private speech into an utterance of the state. Where the student is chosen in a neutral and secular way and where the student is allowed complete autonomy over the message, the student's speech is her own.

B.

The other dominant fact of Lee - whether Duval County students are coerced "to support or participate in religion or its exercise'" by the School Board policy, 505 U.S. at 587, 112 S.Ct. 2649--is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself. We do not quarrel with the Court's suggestion in Lee that students feel compelled to attend graduation, see id. at 593-97, 112 S.Ct. 2649, and that schools "retain a high degree of control" over graduation ceremonies, id. at 597, 112 S.Ct. 2649. But these conclusions do not suffice to decide the issue of coercion under these circumstances. The focus must be on whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, obliges students to participate in a religious exercise. See Lee, 505 U.S. at 594, 112 S.Ct. 2649 (explaining that "[t]he injury caused by the government's action ... is that the State, in a school setting, in effect required participation in a religious exercise").

Here, neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or

message will be delivered, let alone "require" or "coerce" the student audience to participate in any privately-crafted message. While schools may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor. We cannot assume, as Appellants do, that Duval County seniors will interpret the school's failure to censor a private student message for religious content as an endorsement of that message--particularly where the students are expressly informed as part of the election process that they may select a speaker who alone will craft any message. While there may be pressures on students to attend graduation and conform with their peers, see Lee, 505 U.S. at 593-95, 112 S.Ct. 2649, the state's complete control over a religious exercise, essential to Lee's holding, see id. at 590, 112 S.Ct 2649 (finding that "[t]he degree of school involvement here made it clear that the graduation prayers bore the imprint of the State . . ."); id. at 597, 112 S.Ct. 2649 (noting that "the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise . . ."), is conspicuously absent here. Moreover, whatever majoritarian pressures are attendant to a student-led prayer pursuant to a direct student plebiscite on prayer are not facially presented by the Duval County policy.

Appellants also assume that allowing the senior class to vote whether to have a graduation "message" unrestricted in content and to select an autonomous student speaker will have the effect of coercing any chosen speaker

into placating the majority's religious sensibilities by offering a sectarian message of which the majority approves. This argument is highly remote and speculative. Even the scant record before us suggests an opposite conclusion. While ten of the graduation messages delivered pursuant to the policy involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message. In the second place, this argument would be far better suited to an as-applied challenge, where the record has been properly developed, rather than to a facial challenge. A facial challenge to be successful "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct 2095, 95 L.Ed.2d 697 (1987) (emphasis added). Appellants' argument simply ignores the plain text of the policy which only permits graduating students to decide through a vote whether a student volunteer shall give a message of her choice. No religious result is preordained under the policy. On its face, the policy is constitutional under Lee.

II.

We reach the same conclusion when the graduation policy is measured against the three-part Lemon test. Under Lemon, we must evaluate whether: first, the policy has a secular purpose; second, the policy has a primary effect that neither advances nor inhibits religion; and finally, the policy fosters an excessive government entanglement with religion. See Lemon, 403 U.S. at 612-13, 91 S.Ct. 2105.

A.

We begin with the policy's purpose. Lemon requires that a statute must have "a secular legislative purpose." 403 U.S. at 612, 91 S.Ct. 2105. A statute will only violate this prong if it is "entirely motivated by a purpose to advance religion." Wallace v. Jaffree, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (I985); see also Bowen v. Kendrick, 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) (stating that a court "may invalidate a statute only if it is motivated wholly by an impermissible purpose") (citations omitted); Lynch v. Donnelly, 465 U.S. 668, 680, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (observing that "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations"). A statute may satisfy Lemon's first prong even if it is "motivated in part by a religious purpose." Wallace, 472 U.S. at 56, 105 S.Ct. 2479.

Moreover, the Supreme Court has instructed us to be "deferential to a State's articulation of a secular purpose," Edwards v. Aguillard, 482 U.S. 578, 586, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), particularly where "a legislature expresses a plausible secular purpose" for a policy or action, Wallace, 472 U.S. at 74, 105 S.Ct. 2479 (O'Connor, J., concurring in the judgment). We respect that purpose unless it is insincere or a "sham," Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573; Bown, 112 F.3d at 1468, or the statute at

issue has a "preeminent purpose" which is "plainly religious in nature," Stone v. Graham, 449 U.S. 39, 4 1, I01 S.Ct. .192, 66 L.Ed.2d 199 (1980) (per curiam); see also Edwards, 482 U.S. at 591, 107 S.Ct. 2573; Wallace, 472 U.S. at 56-60, 105 S.Ct 2479. But the Supreme Court has been reluctant to attribute an unconstitutional motive where a "plausible" secular purpose may be discerned from the statute. Mueller v. Allen, 463 U.S. 388,394-95 & n.4, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983).

Additionally, "[i]nquiry into legislative purpose begins with interpreting the law itself " Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993). That requires close attention be paid to the plain language of the policy. For the most part, statutes which the Supreme Court has invalidated for lack of secular purpose have openly favored religion or demonstrated a religious purpose on their face. See, e.g., Edwards, 482 U.S. at 593, 107 S.Ct. 2573 (invalidating a Louisiana law that required creationism to be discussed with evolution in public schools); Wallace, 472 U.S. at 57-58, 105 S.Ct. 2479 (overturning an Alabama statute that authorized a moment of silence because the state made no attempt to justify the statute in terms of any secular purpose); Stone, 449 U.S. at 4 1, I01 S.Ct. 192 (striking down a Kentucky statute requiring the posting of the Ten Commandments in public classrooms); Engel v. Vitale, 3 70 U.S. 421, 424, 82 S.Ct 1261, 8 L.Ed.2d 601 (1962) (holding unconstitutional a New York law authorizing state-directed daily classroom prayer in public schools).

In contrast, three secular purposes are plainly encompassed by the Duval County policy. First, the Duval County policy, by its very words, articulates a secular purpose; namely, affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message. By choosing whether to have a graduation message, and if so, the student speaker, the graduating class shares, at least in part, in the civic responsibility of planning their graduation ceremony. See Jones, 977 F.2d at 966 (finding that "[a] meaningful graduation ceremony can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives").

Second, the School Board policy allows students to solemnize graduation as a seminal educational experience. See Lynch, 465 U.S. at 693, 104 S.Ct. 1355 (O'Connor, J., concurring) (noting "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society"); see also Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir.1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997); Jones, 977 F.2d at 966-67. This purpose is not drained of its secular character merely because the policy invites consideration of meaning and values in the context of a graduation ceremony. And it would be very damaging to public education if the Establishment Clause were to be seen as inhibiting any

reflection by a student of transcendent meaning and value in life, whether grounded in religion or not.

Finally, the School Board's policy also evinces an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form. See Pinette, 515 U.S. at 760, 115 S.Ct. 2440 (noting that "[o]ur precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); Mergens, 496 U.S. at 249, 110 S.Ct. 2356 (stating that "prevent[ing] discrimination against religious and other types of speech" has an "undeniably secular" purpose.); Americans United For Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538,1543 (6th Cir. 1992) (en banc) (explaining that a "policy of treating religious speech the same as all other speech certainly serves a secular purpose").

Nevertheless, Appellants suggest that the policy has no true secular purpose and they posit three arguments to show that any avowed secular purpose is actually a "sham." They claim first, that the School Board promulgated the policy as a means to evade the strictures of Lee; second, that the policy's solely sectarian purpose is established by the title of the Reynolds Memorandum, "Graduation Prayer"; and finally, that comments made by some members of the School Board, notably after the policy had been

promulgated and distributed in Duval County, likewise evince a wholly sectarian purpose.

Before examining Appellants' specific claims, we first note that Appellants, without any case authority, ignore the plain text of the policy and its explicitly stated secular purpose, as if there were none. Appellants would divine a wholly sectarian purpose merely by looking at the antecedent history, the title, and the post-enactment debate surrounding the graduation policy. While it is appropriate to consider both the "legislative history and the specific sequence of events leading up to the adoption of the statute," it is, "of course, necessary to examine the language of the statute on its face." Bown, 112 F.3d at 1469 (citing Edwards, 482 U.S. at 594, 107 S.Ct. at 2583; Church of Scientology, 2 F.3d at 1527).

As for Appellants' first claim, Appellants cite no persuasive evidence that the Duval County policy was promulgated to evade the strictures of Lee. Inferring the subjective motivations of policymakers is always a tricky proposition. "[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth, ... discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite." Edwards v. Aguillard, 482 U.S. 578,

636-37, 107 S.Ct 2573, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting).

In this case, that task is made even more difficult because we have no record from which to fairly infer the motivation of those who promulgated or distributed the policy. In so far as we attempt to divine purpose from the decision-makers, "to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds)," the district court found that the "purposes or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds Memorandum of May 5." Adler I, 851 F.Supp. at 451. To the extent that we focus on the motives of Mr. Zenke or Ms. Reynolds, the district court found mixed motives or purposes--to permit students to solemnize the event, to afford the student body the opportunity to select a messenger, who, in turn would, with complete autonomy, choose a secular or sectarian message, and to afford the students the option of having no message at all. See id. at 452.

Appellants offer no good reason to disturb the district court's findings which are grounded in the facially neutral language of the Reynolds Memorandum. Appellants principally rely on the pre-policy history. A review of the pertinent history, however, yields only the observations that prior to Lee Duval County had a long tradition of clergymen offering prayers at commencement ceremonies, that in the wake of Lee in 1992 the School Board terminated the

practice, and that thereafter many members of the community expressed strong views about the policy one way or the other. Appellants highlight the fact that some community members wrote letters imploring Zenke and the Board to find a way to maintain the graduation prayer tradition. It would be an especially dangerous practice if a court could somehow discern legislative purpose, not from the text of the policy, nor from its explicitly stated purpose, nor even from a decision-making body that has offered no debate from which to find purpose, but, rather, simply from the controversy surrounding the subject and the heartfelt and often conflicting views expressed by many members of the community.

In addition, the fact that the Reynolds Memorandum discusses Lee and the question of whether student-initiated, student-led graduation prayer is constitutional does not establish that the policy's secular purposes are a "sham." Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573; Bown, 112 F.3d at 1468. There is nothing inappropriate about a school system attempting to understand its constitutional obligations and to instruct school officials on how to comply with the law. The Reynolds Memorandum simply explained that in spite of Lee the law was unclear on the student prayer issue and that the School Board had been threatened with "lawsuits from both sides on the issue depending on what action" they took. The memorandum, in no way, expressed a desire or preference for student prayer at graduation ceremonies. It simply acknowledged that Lee forbade graduation prayers "directed and initiated by the

school system" rather than student-initiated, student-led prayers. Moreover, as the memorandum made clear, the policy's stated purpose is plainly secular, "to allow students to direct their own graduation message without monitoring or review by school officials," and its features are strictly content-neutral and equally accommodating of secular and sectarian student messages. At worst, the memorandum can be read as contemplating that student prayers could be offered pursuant to the graduation policy and that such occurrences were not strictly forbidden by Lee. Such a supposition does not come close to rendering the policy's secular purposes a sham.

Appellants next suggest that the title of the Reynolds Memorandum, "Graduation Prayer," supports the conclusion that the School Board policy was driven solely by sectarian concerns. The title, however, merely introduces the topic of debate within Duval County in the aftermath of Lee rather than suggesting, let alone compelling, the outcome of that debate. The title affixed to the Reynolds Memorandum does no more than alert the reader to the general subject matter of the text; and it remains the language and substance of the policy, rather than its title, that is controlling. It is altogether unnecessary to requisition the title to cast doubt on the clear and unambiguous purpose of the policy. The crucial term "message" is fully defined by the text of the policy, which provides that the decision whether to have a message is left to the students, that the student body shall choose the student speaker, that the message is limited to two minutes in length, that the

message shall take place at the beginning and/or closing of the graduation ceremony, and, finally, that the content of the message shall be prepared by the student speaker without monitoring or review by the School Board. The title cannot take the place of a detailed review of the policy's facial provisions, let alone create a wholly sectarian purpose out of a textually neutral pronouncement.

Besides being unnecessary, use of the title to inform the plain meaning of the policy's language is improper. Indeed, even if we were examining the title of a statute or legislative codification--and we are doing far less than that here-- the Supreme Court has warned that "the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R, Co., 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Both we and our predecessor court have repeatedly employed this principle of statutory construction when interpreting the statutory text. See, e.g., North Ala. Express, Inc. v. Interstate Commerce Comm'n, 971 F.2d 661, 664 (11th Cir. 1 992) (declaring that "'[s]ection and chapter titles cannot alter the plain meaning of a statute; they can only assist in clarifying ambiguity'") (citation omitted); Scarborough v. Office of Personnel Management, 723 F.2d 801, 817 (11th Cir. 1984) (noting that "reliance upon headings to determine the meaning of a statute is not a

favored method of statutory construction"); Rich v. Commissioner of Internal Revenue Serv., 250 F.2d 170, 175 (5th Cir. 1957) (stating that "[t]he plain and unambiguous meaning of the text of the section cannot be extended by its title or heading").

Finally, Appellants point to post-enactment comments of some members of the School Board made at a June 1, 1993 meeting as evidence of the School Board's wholly sectarian purpose to permit graduating students to pray. However, the district court observed that "[t]he motivation or intent of the Board relative to the Reynolds Memorandum of May 5 is essentially unknown." Adler I, 851 F.Supp. at 452. No debate was had and as far as the record reflects, no vote was taken on the Reynolds Memorandum. The June 1 comments were made almost a month after the policy was promulgated and distributed in the context of a proposal to replace student-initiated messages with a moment of silence. The motion failed and the policy was left in force. At best, the vote can be viewed as a tacit endorsement of the Reynolds Memorandum. Furthermore, a review of the School Board's comments at this meeting do not establish that the School Board sought to direct or endorse graduation prayer via the Reynold Memorandum. The most one could say is that the statement of one School Board member at the June 1 meeting could be characterized as advocating direct school involvement with religion at graduation ceremonies.[8]

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[8]Appellants cite to four post-enactment statements of School Board members to show that the School Board intended to permit graduating

Simply put, the post-enactment comments are not sufficient to transform the policy's express secular purpose into a preeminently religious purpose.

More importantly, regardless of how these post hoc statements are interpreted, they cannot be construed to override the policy's language articulating a clear secular purpose. See Bown, 112 F.3d at 1472. Indeed in Bown, we had occasion to find that the legislative history of a Georgia statute (mandating a period for quiet reflection in public

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students to engage in prayer. In fact, the statements to which the Appellants refer generally buttress the conclusion that the School Board's policy was not a sham. Of those four statements, only the statement of Board member Bill Parker can be characterized as advocating direct school involvement with religion at graduation ceremonies. see Tr. of Duval County Sch. Bd. Meeting at 2 ("I think that our school principals should be allowed to work out a non-sectarian message with our student chaplains, or a guest minister, rabbi or whatever that would be acceptable to all at this very important time in our young people's lives."). The statements of Don Buckley and Nancy Corwin, while generally supportive of religion, acknowledge that an intended effect of the policy is to insulate the content of messages from school influence. See id. at 5 (Buckley) ("I think the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony."); (Corwin) ("I also believe that the democratic process in which seniors were given the ability to choose which form of inspirational message, if any, they wanted at their commencement was an appropriate one and I'm going to stand by it."). Rather than betraying an illegitimate intent to ensure that prayer take place at graduation ceremonies, these statements indicate that Buckley and Corwin perceived the School Board policy as disassociating the school hierarchy from student messages. The fourth statement referenced by Appellants, that of Board member Stan Jordan, was also supportive of the policy. See id. at 8 ("I plan to vote for the administration plan and against the proposal that's on the table."). Taken as a whole these utterances by School Board members constitute recognition that the old regime of state directed school prayer in Duval County had passed and been replaced by a new regime over which they had far less control.

schools), which contained some expressions of religious motives by several legislators who voted for the Act, could not "override the express statutory language articulating a clear secular purpose."[9] Id. Here, we have even far less evidence of a sectarian policy purpose on the part of the School Board or their principals.

In sum, whether standing alone or in concert, the three pieces of evidence cited by Appellants cannot strip the policy of a secular purpose. No matter what an individual board member may have hoped--and they said nothing on the record about codifying this policy--Duval County's policy is facially neutral and undeniably evinces a secular purpose. That is enough to pass constitutional muster under the first prong of Lemon.

B.

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[9]Appellants cite Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), for the proposition that a policy, whose actual purpose is to promote prayer or is "intrinsically religious," Id. at 830, cannot meet the secular purpose prong of Lemon. But Jager does no more than state the obvious, that in order to meet Lemon first prong, a government policy must have a genuine secular purpose and not be a sham. See Edwards, 482 U.S. at 586-87, 107 S.Ct. 2573. If a policy's "actual purpose" is wholly religious then Lemon's secular purpose requirement is not satisfied. In Jager we held that a school district's practice of having representatives of student organizations deliver invocations prior to football games had as its "preeminent purpose" the endorsement of Protestant Christianity. Id. ,862 F.2d at 830. The only discretion left to the students was the selection of who would pray.

As for whether the policy has the primary effect of advancing religion, we conclude that because the policy, on its face, allows a student message on any topic of the student's choice it satisfies the second prong of Lemon. The Duval County School Board policy is content-neutral and does not mandate or even encourage that a graduation prayer will be uttered. As the district court found, the implementation of the policy may result in no graduation prayer at all. See Adler I, 851 F.Supp. at 454. While it is undoubtably true that an autonomous student speaker could read a prayer at graduation under the policy, it is equally true that the same speaker may opt for a wholly secular message instead. It would require a strain of the term "primary" to suggest that a content-neutral forum policy, which accommodates private sectarian and secular speech on an equal basis, has the "primary" or "principal" effect of advancing religion.

Moreover, we believe that a student's private choice to deliver a religious message at graduation is a religious effect attributable to the student father than to the facial terms of the Duval County policy. As the Supreme Court has explained, "to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Corporation of Presiding Bishop of Church of Jesus Christ Latter-Day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 97 L.Ed.2d 273(1987). Here, the policy strips the School Board of any authority over the central decisions– who speaks, whether there will be a speaker, and what the

content of the speech may be. Indeed, in order to ensure that no one perceives any student's religious utterance as being the state's prayer, the policy explicitly divorces any student message from School Board sponsorship by specifically stating that any message will be "prepared by the student volunteer and shall not be monitored or otherwise reviewed" by the School Board or its employees. This language acts as an overt disclaimer, further distancing the state from the student message.

Our conclusion is amply supported by Supreme Court caselaw. The Court,, under Lemon,, repeatedly has upheld facially neutral programs that permit individuals to support religion through their own private choices. See, e.g., Agostini, 521 U.S. at 223-232, 117 S.Ct. 1997 (upholding New York program of sending public school teachers into parochial schools to provide remedial education where aid was made available to religious and secular beneficiaries on a nondiscriminatory basis); Zobrest, 509 U.S. at 8-12, 113 S.Ct. 2462 (sustaining section of Individual with Disabilities Act providing disabled children with aid regardless of whether a child attends a sectarian institution); Witters, 474 U.S. at 488, 106 S.Ct. 748 (holding that Establishment Clause was not violated when the state paid a blind student's tuition at a Christian college through a generally-applicable aid program because any public aid that reached religious institutions under the program was "a result of the genuinely independent and private choices of aid recipients"); Mueller v. Allen, 463 U.S. at 399, 103 S.Ct. 3062 (upholding a state tax deduction for specified educational

expenses, and characterizing any such aid to religion as being "only as a result of numerous, private choices of individual parents of school-age children"). The Duval County policy allows elected student speakers the freedom to privately choose a graduation message of an either secular, sectarian, or mixed nature. We therefore find that the Duval County policy does not have a primary effect of advancing religion.

C.

For many of the same reasons, we conclude that the School Board's policy does not excessively entangle the Board with religion in violation of the third part of the Lemon test.[10] The policy remains facially neutral with respect to religion, requiring only that graduation messages be voted on by students, and composed and directed by a student speaker. By its very terms, the policy explicitly prohibits any review of the student message at all. Undoubtedly, the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality. See Mergens 496 U.S. at 253, 110 S.Ct. 2356 (stating that "a denial of equal access to religious speech might well create

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[10]Recently, in Agostini, the Court merged the second and third Lemon prongs because "the factors we use to assess whether an entanglement is 'excessive' are similar to the fact we use to examine 'effect.'" Id., 521 U.S. at 232.

greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); Widmar, 454 U.S. at 272 n. 11, 102 S.Ct. 269 (noting that schools who adopt open-forum policies for private secular and religious groups equally "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'"); Chabad-Lubāvitch, 5 F.3d at 1389; Jager, 862 F.2d at 831.

Implicit in Appellants' rationale is the need for school censorship if schools are to allow students the opportunity to speak at graduation at all. At the core of Appellants' position is the claim that the state's control over nearly all aspects of the graduation ceremony automatically imputes all private speech to the state. But the degree of control that schools generally exert over high school graduation ceremonies is unlikely to diminish because graduation ceremonies are, by their nature, highly choreographed. Appellants' position therefore would leave school officials with only two choices: either eliminate student speech altogether or retain student speech, subject to censorship by school authorities. If school officials choose the latter course, they will be left with the unenviable task of identifying the religious content in student speeches for excision prior to graduation or of interrupting renegade graduation speakers who resort to sectarian speech.[11] If,

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[11]There is no easy or precise guideline for school officials to follow when excising student speech of religious content. The constitutional definition of religion is expansive; it encompasses "all sincere religious

however, they choose the former, they will have deprived the graduation class of any role in shaping its high school graduation and they will have banned all private student expression. The Establishment Clause requires no such Hobson's choice. What it does require is a recognition of the critical difference between a private statement of religious values and a religious utterance endorsed by the state. The Duval County School Board's policy, on its face, does no more than recognize this distinction.

III.

Based on the foregoing, we hold that the Duval County school system's policy of permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause. We therefore affirm the judgment of the district court.

AFFIRMED.

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beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent" and "which occupies in the life of its possessor a place parallel to that filled by [] God." United States v. Seeger, 380 U.S. 163, 176, 85 S.Ct 850, 3 L.Ed.2d 733 (1965). Moreover, the beliefs "need not be acceptable, logical, consistent, or comprehensible to others." Thomas v. Review Bd., 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Moreover, if the School Board's censorship was not "rigorous" enough to prevent religion from creeping into graduation ceremonies, a policy of allowing even monitored student speech still would be subject to constitutional attack.

KRAVITCH, Senior Circuit Judge, *dissenting*, in which BARKETT, Circuit Judge, joins:

I agree with the majority that the Supreme Court's decisions in Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992), and Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971), control this case. I disagree, however, with the majority's application of those decisions to the facts of this case. The majority articulately defends the constitutionality of the Duval County graduation policy, but the analysis is flawed by an unwillingness to look beyond the policy's terms. A broader, more contextual appraisal leads me to conclude that the Duval County policy violates the Establishment Clause of the First Amendment. Therefore, I respectfully dissent.

In Lee, 505 U.S. at 586, 112 S. Ct. at 2655, the Supreme Court held a graduation ceremony unconstitutional because (1) school officials were overly involved with the delivery of a prayer, and (2) audience members were in effect required to participate in a formal religious exercise. Admittedly, the link between the Duval County policy and resulting prayer at graduation ceremonies is not as direct as in Lee. But although the Duval County school administration may have *distanced* itself from prayer offered during graduation ceremonies, it did not *disconnect* itself from religious expression. Nor does the policy mitigate the influences that coerce audience members to participate in prayers offered at graduation.

Although Lee presents a specific example of an Establishment Clause violation, Lemon, 403 U.S. at 612-13, 91 S. Ct. at 2111, still provides the general Establishment Clause test. The Duval County policy runs afoul of the Lemon test because its only credible purpose is to maximize the chance that prayer will continue to play a prominent role in Duval County graduations. Furthermore, the policy's "primary effect" is to advance religion. The policy communicates an endorsement of religion both because it leads to more religious expression in the opening and closing messages than all other types of speech, and because its purpose is apparent to any reasonable observer aware of its terms, the graduation traditions in Duval County, and the events leading to the policy's creation.

Invoking the ideals of free student expression and referencing the public forum doctrine do not cleanse the Duval County policy of its constitutional defects. Allowing a student majority to do what the school administration could not offends our constitutional scheme of individual rights. Nor does the policy promote free expression or render the graduation ceremony equally available for any sort of speech-not when it allows for only one speaker, and a speaker chosen by majority vote at that.

In addition to disagreeing with the majority's facial analysis of the Duval County policy, I take issue with the conclusion that the plaintiffs waived their as-applied claims. After analyzing the Duval County policy under both Lee and Lemon, and critiquing the majority's public forum

analogy, this dissent concludes with a brief examination of the procedural posture of the case and the district court's order advancing the trial on the merits.

A. Lee v. Weisman

The starting point for the analysis of the Duval County policy is Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992), because it is the only Supreme Court case invo ing prayer at public school graduation ceremonies. In Lee, a principal invited a rabbi to give a prayer at the school's graduation ceremony and provided a pamphlet suggesting an appropriate tone and possible content for the presentation. Id. at 581, 112 S. Ct at 2652. The Supreme Court found it unnecessary to apply the Lemon analysis in Lee because two "dominant facts rendered the rabbi's prayer so clearly unconstitutional. Id. at 586, 112 S. Ct at 2655. First, "[t]he government involvement with religious activity [was] pervasive, to the point of creating a state-sponsored and religious exercise in a public school." Id. at 587, 112 S. Ct at 2655. Second, "the State, in a school setting, in effect required participation in a religious exercise." Id. at 594, 112 S. Ct. at 2659. The majority purports to evaluate Duval County's policy in light of the standards enunciated in Lee but it both understates the degree of state direction relevant for the first prong of the Lee analysis and effectively writes Lee's second "dominant fact," coerced participation, out of the opinion by conflating it with the state's control over the religious exercise itself.

1. State Control

In Lee, state actors made the decision to include an invocation and benediction in the graduation ceremony, selected the speaker, and suggested an appropriate tone for the message. Id. at 587-88, 112 S. Ct. at 2655-56. These elements of state involvement are of constitutional import because they "made it clear that the graduation prayers bore the imprint of the State." Id. at 590, 112 S. Ct at 2657. Admittedly, the Duval County policy is not as egregious as the practice scrutinized in Lee. The state involvement with prayers offered through the operation of the policy, however, is still too extensive to comport with the Establishment Clause.

In its own search for state involvement the majority focuses on the student standing alone at the podium delivering an uncensored message, but ignores how she got there. A broader inquiry reveals that the state directs the exercise of prayer at Duval County high school graduations because: (1) the programmatic constraints imposed by the graduation policy promote religious expression, especially given the context surrounding the policy's promulgation, (2) the election of a student to deliver the opening or closing "message" is state action, and (3) the vote for student speaker is based on the expected content of the candidate's message.

According to the majority, "[t]he School Board ... does not suggest in any way ... that the graduating class consider

religious or any other criteria in deciding whether to have a student message or in selecting a particular student speaker." The policy does not permit the school administration to remain passive, however, and the policy's terms do encourage the senior class to consider religious criteria in planning the opening and closing.

Under the terms of the policy, it is the high school administration that organizes elections for the graduation program. The policy only allows for student input concerning the beginning and end of the ceremony--portions of the program appropriate for a limited range of speech. The policy also dictates that the opening and closing messages last no more than two minutes, further limiting the types of speech possible. The constraints of the policy itself provide clues about the type of message the school administration had in mind. In case students need more of a hint, however, history provides one. Until the year the policy went into effect, Duval County high school graduations had opened and closed with a prayer. As the district court noted, "[i]nvocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies" in Duval County. Adler v. Duval County Sch. Bd., 851 F. Supp. 446, 453 n.9 (M.D. Fla. 1994).

Moreover, the senior class vote is itself attributable to the state. The majority concludes otherwise because it views the students as making all of the "central" decisions regarding the opening and closing message. This logic

undervalues the power of the policy's terms to influence the students' choices; it also treats the graduation "message" as if it were an independent event, rather than the opening and closing segment of a more substantial occasion, the graduation ceremony. This narrow perspective permits the majority to ignore the fact that the Duval County policy gives students control over only a tiny fraction of the graduation ceremony as a whole.[1]

The actions of a private party can be attributed to the state if they are taken in exercise of a right or privilege rooted in state authority, and if the private party can "in all fairness" be described as a state actor. See Edmonson v.

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[1]Both the Ninth and the Third Circuits have recognized that student decisions concerning particular aspects of their graduation ceremonies are attributable to the state. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), vacated with directions to dismiss as moot, 515 U.S. 1154, 115 S.Ct 2604 (1995). These courts both focused on the graduation ceremony as a whole. They noted that the school administration is ultimately responsible for the graduation ceremonies, and that "the seniors have authority to make decisions regarding graduation only because the school allows them to have it." Harris, 41 F.3d at 454; see also, Black Horse Pike, 81 F.3d at 1479. They also acknowledged the school's extensive involvement with other details of the graduation ceremony. See Black Horse Pike., 81 F.3d at 1479; Harris, 41 F.3d at 454. Only the Fifth Circuit has held that a student vote regarding prayer cannot be attributed to the state, see Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970-71 (5th Cir.), vacated, 505 US. 1215, 112 S. Ct. 3020 (1992), but that holding is in tension with the more recent case of Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), cert. granted in part 120 S. Ct. 494.(Nov. 15, 1999). In Santa Fe, the Fifth Circuit held that allowing proselytizing prayers at graduation violated the First Amendment, even though the senior class selected the speaker. 168 F.3d at 817.

Leesville Concrete Co., 500 U. S. 614, 620, 111 S. Ct. 2077, 2082-83 (1991). Clearly, the student vote satisfies the first part of this analysis: but for the policy, the student vote would not occur. Before the policy went into effect, students may have had input, but ultimately the school administration decided whether to have a formal opening and closing segment of the graduation ceremony, and if so, what to include in those portions of the program.

Whether a private party can "in all fairness" be described as a state actor depends on whether the party's actions are "governmental in character." See, id. at 621, 111 S. Ct. at 2083. Relevant to this analysis are: "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." Id. at 621-22, 111 S. Ct. at 2083 (citations omitted). Considered in light of these three factors, the student decisions made pursuant to the Duval County policy are "governmental in character."

First, the students vote not merely with the cooperation of the school authorities but at the behest of school district policy. They do so on school property, and the assistance or cooperation of the principal and faculty with administering the election must be presumed. Furthermore, students vote about a message that will be delivered at an event sponsored and controlled by the school.

Second, planning public school graduation ceremonies is a traditional governmental function. The Supreme Court noted in Lee that "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." 505 U.S. at 591, 112 S. Ct. at 2660. Before the policy went into effect, the Duval County school administration had the power to plan every aspect of the graduation ceremonies, including the opening and closing, and the policy does not divest the administration of control over the graduation ceremonies generally.

Finally, prayers recited during the-opening and closing portions of the ceremony have an injurious effect precisely because of the state association with the event. Most people properly perceive their everyday encounters with others' religious expression as an incidental requirement of life in a diverse society, rather than as a burden or attack on their own beliefs. See Lee, 305 U.S. at 628, 112 S. Ct. at 2677 (Souter, Stevens, & O'Connor, JJ., concurring). It is *government* participation in religious expression that offends the First Amendment because of its power to influence the inherently personal nature of religious faith, potentially coercing religious minorities or even coopting mainstream sects. See id. at 591-92, 112 S. Ct. 2657-58; see also id. at 608-09, 112 S. Ct. at 2666 (Blackmun, Stevens, & O'Connor, JJ., concurring).

The student vote satisfies the criteria for state action described in Edmonson. and other cases have identified state action in a similar context. These cases stand for the proposition that when government delegates authority over a portion of a public operation to an ostensibly private actor, but retains ultimate control over the larger operation, the exercise of the delegated authority is attributable to the state. Administering elections, for example, is a state function. Although states can give political parties and private associations a role in choosing candidates to appear on the ballot, the private entities' fulfillment of that role is state action. See Terry v. Adams, 345 U.S. 461, 469, 73 S. Ct. 809, 813 (1953); Smith v. Allwright, 321 U.S. 649, 663, 64 S. Ct. 757, 765 (1944). The state cannot escape its responsibility to maintain an electoral system that comports with the Constitution by allowing non-governmental entities to control part of the electoral system. See Terry, 345 U.S. at 469, 73 S. Ct. at 813.

These rules do not only apply to fundamental governmental operations such as elections. For example, after a city has managed a park for a period of time, it cannot continue to maintain the facilities but avoid the Fourteenth Amendment's mandate to integrate by appointing private trustees to oversee the park. See Evans v. Newton, 382 U. S. 296, 301, 86 S. Ct. 486, 489 (1966). The park in Evans had acquired "momentum" as a public facility, and the city remained "entwined" in its operation. It was of no consequence that the trustees with official authority were not public employees, because "when private

individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[2] Id. at 299, 86 S. Ct. at 488.

So it is with Duval County's public high school graduation ceremonies, which have always been state-sponsored events. Through the graduation policy, the school administration delegates one decision to the senior class, but in all other ways "remains entwined in the management [and] control" of the graduation ceremonies. Id. at 301, 86 S. Ct. at 489.

The fact that the policy requires the senior class to exercise its decisionmaking authority through a majoritarian vote does not change the analysis. "One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86 (1943). After all, "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political

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[2]Indeed, even if all maintenance and title to the land were in private hands, the park's management would have to comply with the Constitution because "the predominant character and purpose of [the] park are municipal." Evans, 382 U.S. at 302, 86 S. Ct at 490.

controversy, to place them beyond the reach of majorities."[3] Id., 63. S. Ct. at 1185.

To further distance the state from the actual content of the opening and closing messages, the majority emphasizes that the senior class votes for a speaker, not a particular speech. The majority concludes that the selection of the student speaker is made in a content-neutral manner. It requires a logical leap, however, to move from the student speaker's limited autonomy to craft the graduation message to the conclusion that the senior class chooses the speaker without considering what she is going to say.

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[3]Under the majority's reasoning, student councils could, without prompting, vote to decorate each classroom with the Ten Commandments or to have a student volunteer begin each school day by reading a prayer over the public address system. In one sense the policy at issue in this case poses more of a constitutional problem than these examples. The student council's decisions would at least be genuinely student-initiated, but here the opportunity for an opening and closing message is created by the school administration and the vote is organized and influenced by school officials. Local government could undermine minority and individual rights in a similar fashion. In County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), the Supreme Court held that permitting the display of a creche in the Grand Staircase of a county courthouse violated the First Amendment. The majority's view here suggests that a town council in a religiously observant and overwhelmingly Christian community could bypass the holding in Allegheny by sponsoring an election each year for volunteer committees to decorate town hall in mid-December or in the weeks following the secular holiday of Mardi Gras. Such a procedure, however, would not alter the city's control over town hall or eliminate the symbolic connection between the religious decorations and the town government.

It is more realistic to acknowledge that students vote based on the anticipated content of the candidates' graduation message. Unlike typical elected offices with numerous responsibilities or strictly honorary positions such as the homecoming queen mentioned in the majority opinion, the graduation speaker is elected to carry out one very specific task: she must deliver a single speech that lasts less than two minutes. If the school board does not expect students to vote based on how they anticipate the candidates will perform that one responsibility, then why have an election at all?[4]

Factoring the content of the speech into the choice of speaker is problematic because the choice is attributable to the state and because the terms of the policy influence the choice as well. Furthermore, given the pervasive state involvement in public school graduation, abstaining from censorship is not enough to sever the state's association with speech made at the ceremony. To effectively disconnect itself from that speech, the state must be able to articulate secular, neutral criteria for selecting the speaker that are not related to the content of the speech.

This is the rule suggested by the Ninth Circuit's decision in Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832

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[4]Certainly some students will vote based on criteria such as the popularity of the candidates. We cannot assume, however, that this will be the norm. It is worth noting that the Duval County policy imposes no limits on campaigning.

(9th Cir. 1998), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc). The majority finds the Duval County policy similar to the policy in Doe, but it is the differences that are instructive. Under the policy at issue in Doe, a minimum of four student speakers were selected strictly on the basis of their academic standing to deliver any sort of address they wanted.[5] See id. at 835. There was no opportunity to influence the types of speeches given, because there was no discretion in choosing the speakers. The authorities could also disconnect themselves from the content of the student speakers' speech because the speakers were chosen not for the views their peers or teachers hoped they would espouse, but on the basis of a non-content based objective criterion (class standing) related to the graduation ceremony's purpose of celebrating student achievement.

Although the Duval County policy does not mandate that a prayer be offered at every graduation, it nonetheless keeps the state heavily involved in the choices regarding the ceremonies' opening and closing. The policy not only allows, but in some ways encourages, the choice of prayer. Although subtler and more indirect than the practice at

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[5]The policy in Doe did not limit the duration of the students' speech nor restrict it to a segment of the graduation program uniquely appropriate for, and traditionally devoted to, prayer. See id. at 834. Unlike the Duval County policy, nothing about the policy in Doe encouraged the student speakers to choose to deliver a prayer. If anything, requiring a minimum of four speakers minimizes the risk that the school administration promotes any particular type of message through the policy.

issue in Lee, the Duval County policy contains the same elements of state involvement with religious expression.

2. Coerced Participation in a Religious Exercise

The second dominant fact in Lee was that the state in effect compelled the graduating students' participation in a religious exercise. See 505 U.S. at 586, 112 S. Ct. at 2655. Coerced participation in a religious exercise is a separate and distinct issue from that of who controls the religious exercise. According to the Supreme Court, this coerced participation in prayer represents the injury suffered by dissenting students. See Lee 505 U.S. at 594, 112 S. Ct. at 2659.

Writing about this second dominant fact, the Lee Court stated: "The sole question presented is whether a religious exercise may be conducted at a graduation ceremony where, as we have found, young graduates who object are induced to conform." Id. at 599, 112 S. Ct. at 2661. The majority here refuses to address that question. Instead, it holds that whether the school administration coerces student participation in a religious exercise "is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself." The majority cites no authority for this interpretation, which essentially reads the "second

dominant fact" out of Lee and disregards much of that decision's analysis.[6]

The majority's interpretation also ignores the relationship between the Free Exercise and Establishment Clauses of the First Amendment. "The Free Exercise Clause embraces a freedom of conscience and worship," and the Establishment Clause is "[t]he method for protecting [that] freedom of worship and freedom of conscience in religious matters." Id. at 591, 112 S. Ct. at 2657. When the government requires an individual to participate in a religious exercise, it impinges that individual's freedom of conscience and worship, even if the government is not conducting the religious service itself.

Three factors contributed to the coercion of student participation in prayer in Lee. First, attendance for seniors is in effect mandatory because graduation is a significant right of passage in our society. See id. at 595, 112 S. Ct. at

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[6]The Supreme Court did not state in Lee whether either one of the "dominant facts" would constitute a violation of the Establishment Clause by itself, or whether the government needs to both direct a religious exercise and coerce participation in that religious practice. By deciding that coerced participation only exists if the government controls the religious exercise, the majority in this case answers the question, but in quick fashion. We need not address the relationship between the two dominant facts, because we conclude that both are present in the Duval County policy. It is worth reiterating, however, that the Supreme Court identified the injury to the student plaintiffs as the mandatory participation in a religious exercise, without making reference to who conducted or controlled it See Lee, 505 U.S. at 594, 112 S. Ct. at 2659.

2659. Second, "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." Id. at 597, 112 S.Ct. at 2660. Finally, adolescents are susceptible to peer pressure, and the pressure to conform "is strongest in matters of social convention." Id. at 593, 112 S.Ct. at 2659.

These coercive elements are as present at Duval County graduation ceremonies under the policy at issue in this case as they were at the Providence, Rhode Island, graduation scrutinized in Lee. Graduation is a central life event for teenagers in north Florida. School authorities set the dress code and prescribe appropriate behavior for seniors. Often, students are required to remain silent or even stand for the ceremonies' opening and closing messages. The Duval County policy exacerbates peer pressure, because would-be dissenters know that the majority of their classmates chose the student speaker. Finally, the policy heightens the social pressure to participate by allowing religious expression at a formal, ceremonial stage of the graduation. The audience remains seated and passive through much of the graduation, including speeches by the valedictorian and invited dignitaries, but the opening and closing call for participation of some sort.[7] According to Lee, even an

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[7]Duval County graduations bear out this observation. School officials typically ask the audience to stand for the first few segments of the ceremony, including the "Invocation" or "Inspiration" and there often is a

understated gesture such as standing or remaining respectfully silent is a constitutionally significant degree of participation. See id. at 593, 112 S. Ct. at 2658. Students cannot be expected to express dissent in this environment, with the obligation of polite participation and the school authorities' control over student decorum.

B. The Lemon Test

Lee is an obvious point of departure for evaluating the Graduation Policy because it is the most factually similar Supreme Court case, but it did not establish a new test for the Establishment Clause, and the Supreme Court did not state that the facts of Lee represent the boundary between what is and what is not constitutional. Lemon still provides the framework for evaluating a statute or policy's compliance with the Establishment Clause; it is the heart of the analysis.

Lemon requires that: (1) the Duval County school system have a secular purpose for adopting the policy; (2) the policy's primary effect neither advances nor inhibits religion; and (3) the policy does not result in excessive Government entanglement with religion. See Lemon v.

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song calling for more substantial participation. The audience then sits for the main body of the ceremony, which includes speeches and the presentation of diplomas. See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 4-7, 8-19, 22, 25-28, 32-33, 37-40, 42-45).

Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct 2105, 2111 (1971). The Duval County policy would violate the Establishment Clause if it fails to meet even one of these criteria, see Edwards v. Aguillard, 482 U.S. 578, 585, 107 S. Ct. 2573, 2577 (1987), but it falls short on two grounds: the policy has no genuine secular purpose, and its primary effect is to advance religion.

1. The Purpose of the Duval County Policy is Pre-Eminently Religious

Applying the first prong of the Lemon test, we determine whether the challenged policy has a "clearly secular purpose" or "whether [the] government's actual purpose is to endorse or disapprove of religion." Wallace v. Jaffree, 472 U.S. 38, 56,1 05 S.Ct. 2479, 2489 (1985). We must be deferential to the government's articulation of the purpose behind a policy, and that policy need not be exclusively or even predominantly secular. See Edwards, 482 U.S. at 586-87, 107 S. Ct. at 2579; Wallace, 472 U.S. at 56, 105 S. Ct. at 2489. We must not, however, shirk our responsibility of judicial review. If a policy's "pre-eminent purpose" is religious, or if the proffered secular justifications for the policy are insincere, then the policy violates the Establishment Clause. See Edwards, 482 U.S. at 586-87, 107 S. Ct. at 2579; Lynch v. Donnelly, 465 US. 668, 690-91, 104 S. Ct. 1355, 1368-69 (1984) (O'Connor, J., concurring); Stone v. Graham, 449 U.S. 39, 41, I01 S. Ct 192, 193-94 (1980); Church of Scientology Flag Serv. Org. v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993). This is the

case with the Duval County policy. The dominant reason for its passage was to keep prayer in graduation ceremonies; the secular justifications embraced by the majority are at best incidental effects of the policy.

The context surrounding the creation of the policy, the policy's terms, and the policy's title all suggest its predominantly religious purpose. The chronology of events leading up to the graduation policy is particularly telling. Until 1992 Duval County consistently opened and closed its schools' graduation ceremonies with prayer. Responding to the Lee decision in 1992, the school administration directed that future graduations could not include prayer. The administration then came under pressure from students and the community to find a way to retain prayer in the ceremonies. Before the next school year's graduation ceremonies, the administration created a new policy. That policy delegated decisions about the graduation ceremonies' opening and closing to students while lifting the restriction on religious expression. Finding a predominantly religious purpose behind the new policy in this context requires no speculation but only common sense.

Aspects of the new policy itself betray the purpose of maximizing the chance that prayer would be included in future graduation ceremonies without directly mimicking the school officials' actions proscribed by Lee. The policy only involves the opening and closing segments of the graduation ceremonies-the portions of the program historically dedicated to prayer. The policy also carefully

restricts opening and closing messages to two minutes, a short period amenable to a limited range of speech that includes prayer. Finally, the policy dictates that decisions about the two minute opening and closing be made by majoritarian vote, limiting the opportunity for innovation and variety.

Finally, there is the title of the memorandum announcing the new policy: Graduation Prayer. The attorney who drafted the memorandum obviously understood the reason for the policy, but the majority of this court chooses to ignore the evidence. Instead, it relies on the maxim that it is improper to use a statute's title to inform the plain meaning of the statute's language. In all the cases cited by the majority, however, the courts had to interpret the meaning of statutes in order to apply them correctly.[8] In this case, on the other hand, the question is why the school administration created the policy.

Moreover, "Graduation Prayer" is not simply the name of a bill or a title chosen during the codification process: it is title of the memorandum announcing and explaining the new policy to the principals who would have to administer it. The Graduation Prayer memorandum was written at the

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[8]See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 525-26, 67 S. Ct. 1387, 1390-91 (1947); North Ala. Express, Inc. v. Interstate Commerce Comm'n, 971 F.2d 661, 663-64 (11th Cir. 1992); Scarborough v. Office of Personnel Management, 723 F.2d 801, 811-16 (11th Cir. 1984); Rich v. Commissioner of Internal Revenue Serv., 250 F.2d 170, 173-75 (5th Cir. 1957).

behest of the school Superintendent by the attorney who crafted the policy.[9] Certainly the title and text of the memorandum could provide insight into the policy's instrumental goals.

The memorandum begins with two paragraphs devoted to prayers at graduation and the discord following Lee. This analysis concludes with an explanation of the "key to the Lee v. Wiseman [sic] decision,"' and then, "[w]ith that premise in mind," segues into the provisions of the new policy. The policy's operational terms carefully avoid mention of prayer, but the memorandum as a whole makes clear that the choice of a title was far from incongruous.

The majority makes much of the "plain" and "facially neutral" language of the policy itself. Adopting the terminology "opening or closing message" in the wake of Lee, however, appears as subterfuge, a "sham," see Edwards, 482 U.S. at 587, 107 S. Ct. at 2579, given the tradition of beginning and ending graduation with prayer. In the words of Shakespeare: "What's in a name? That which we call a rose / By any other name would smell as sweet."[10]

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[9]In sharp contrast, numerous legislators influence the choice of statutory language, and titles are often chosen for political effect rather than to accurately summarize a bill's purpose or content.

[10]William Shakespeare, Romeo and Juliet, act 2, sc. 2.

Unconvinced, the majority suggests three possible secular purposes for the policy: First, that the policy "afford[s] graduating students an opportunity to direct their own graduation ceremony;" second, that it permits free expression; and finally that the policy "allows students to solemnize graduation." None of these possibilities withstands close scrutiny.

It is hard to accept that the Duval County school administration crafted the policy to empower students, both because the policy does so in such a constrained manner and because there is scant evidence that the administration was interested in promoting student leadership or autonomy as ends in themselves. The policy does conclude with the statement, "[t]he purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials," but the majority places more significance on the statement than it can bear.[11] The statement expresses the "purpose" of the policy in terms of what it does, rather than why it was created. And as mentioned above, the memorandum begins

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[11]The Supreme Court looked beyond a similarly "self-serving" statement of purpose in a Kentucky statute in Stone, 449 U.S. at 41, 101 S. Ct at 193-94. The statute required that the Ten Commandments be posted in each classroom and noted the "'secular application of the Ten Commandments'" in their "'adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" Id. at 41, 101 S. Ct. at 193 (quoting Ky. Rev. Stat. Ann. § 158.178 (Banks Baldwin 1980). Despite the elucidation of a legitimate educational rationale in the statute, the Court held that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Id. at 41, 101 S.Ct. at 194.

with two paragraphs about school prayer and instructs the reader to consider the terms of the policy with that discussion in mind. The sentence about student direction, without any accompanying elaboration, appears "tacked on" to the end of the memorandum.

This secular purpose inserted in the text might still be credible if there were any other indication that the administration had been considering the benefits of expanded student speech and self-governance before the intense interest in graduation prayer arose following Lee. Although the record is replete with evidence that students and community members pressed school officials to retain prayer in the graduation ceremonies, however, there is no evidence that officials were promoting, or that students were demanding, a larger role planning the graduation program and more student speech generally.[12]

Finally, the Duval County policy enhances student control over the graduation ceremony in only the most limited sense. The senior class cannot choose to have a group deliver a message, and it cannot select a non-student speaker. The speaker's options are limited, because the

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[12]I do not mean to suggest that the school administration was hostile to student involvement in planning graduation ceremonies. Historically the student role in planning graduation varied from school to school. Student leadership was quite strong at some schools, but school officials always had ultimate authority over the graduation programs. There simply is no evidence that interest in, or pressure for, student autonomy was on the rise in 1992 and 1993.

policy restricts the message to two minutes at the beginning or end of the ceremony. Interestingly, the policy does not ensure that other student presentations during the graduation will be uncensored. In fact, principals often review valedictory speeches in Duval County.[13] Although the school administration can promote student expression incrementally, the graduation policy's stringent constraints and the choice to relinquish to students only the planning for the opening and closing suggest that student autonomy and free expression were not the policy's true purposes.

The majority also suggests that solemnizing graduation ceremonies may have been the purpose behind the Duval County policy, but the policy actually reduces the potential for solemnization. Until the policy went into effect, an opening and closing prayer at every graduation ceremony served a solemnizing function. Now, however, the opening and closing are optional, and for each graduation, students have to choose anew whether to even have a message. Moreover, the majority is quick to emphasize that the policy leaves the content of the opening and closing messages, should the senior class decide to have them, unfettered. If the choice of messages is as wide-ranging as the majority would have us believe, however, many of the possibilities

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[13] See R 1st Supp. Exs. (Reynolds Dep. at 21; Epting Dep. at 26-27; Lockett Dep. at 11).

would serve no solemnizing function.[14] With its new policy, Duval County moved from having a solemnizing opening and closing message at every graduation ceremony to the possibility of having, if not a prayer, either no message or a message that undermines the solemnity of the occasion.

Moreover, solemnization is not a valid purpose for a policy purportedly giving students unfettered control over the content of a speech. As already noted, prayer is one of a limited subset of messages with a solemnizing effect. To the extent the school administration wanted and expected students to opt for solemnizing messages, it is likely the

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[14]Uninfluenced by the terms of the policy or the expectations of their teachers and colleagues, student speakers could take the opportunity to criticize the principal, teachers, or cliquish classmates. Even an innocent but unfocused or poorly delivered speech would not solemnize the event. A proselytizing prayer would prove divisive rather than solemnizing as well. See Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816 (5th Cir. 1999), cert. granted in part, 120 S. Ct 494 (Nov. 15, 1999) ("[W]e cannot fathom how permitting students to deliver sectarian and proselytizing prayers can possibly be interpreted as furthering a solemnizing effect"). The majority cites three cases for the proposition that prayer can serve a legitimate solemnizing function, but all three recognized that they were considering only nonsectarian, nonproselytizing speech. See Chaudhuri v. Tennessee, 130 F.3d 232, 236-37 (6th Cir. 1997) cert. denied 523 U.S. 1024,118 S. Ct. 1308 (1998); Tanford v. Brand, 104 F.3d 982, 983, 986 (7th Cir. 1997); Jones, 977 F.2d at 964-66. The majority also cites Justice O'Connor's concurrence in Lynch for the more general proposition that religious expression can solemnize public occasions, but Justice O'Connor's statement is qualified. "[G]overnment acknowledgments of religion," she writes, can "serve ... the legitimate secular purposes [] of solemnizing public occasions," but her examples are all practices that "are not understood as conveying government approval of particular religious beliefs." Lynch, 465 U.S. at 693, 104 S. Ct. at 1369-70.

administration had prayer in mind. This is an illegitimate purpose under Lemon; public officials cannot encourage prayer, because even if prayer has secondary secular benefits, the promotion of prayer is first and foremost the promotion of religion. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1485 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 458 (9th Cir. 1994), vacated with directions to dismiss as moot, 515 U.S. 1154, 115 S. Ct. 2604 (1995); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829-30 (11th Cir. 1989).

Finally, by the majority's own logic, solemnization should not be considered as a possible purpose for the graduation policy. The majority chides Appellants for looking beyond the text of the Graduation Prayer memorandum, but solemnization appears nowhere in the policy's terms or the memorandum's prefatory paragraphs. Hypothetical justifications for a state law or action are not enough to satisfy the Lemon test; courts must look for the *actual* purpose. See Wallace,, 472 U.S. at 56, 105 S. Ct. at 2489. In this case, that search leads only to the promotion of religion.

2. The Primary Effect of the Duval County Policy is to Advance Religion

A governmental policy fails the second prong of the Lemon analysis if it has the primary effect of endorsing religion. See County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592-94, 109 S. Ct. 3086,

3100-01 (I989). Endorsement occurs if a reasonable observer would believe the policy conveys a message favoring (or disfavoring) religion. See id. 492 U.S. at 597, 109 S. Ct. at 3103 (Blackmun & Stevens, JJ.); id. at 691-92, 109 S. Ct. at 3121 (O'Connor, Brennan, & Stevens, JJ., concurring); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S. Ct. 3216, 3226 (1985), amended on other grounds, Agostini v. Felton, 521 U.S. 203, 236, 117 S. Ct 1997, 2016 (1997); Lynch, 465 U.S. at 691-92,104 S. Ct. at 1369 (O'Connor, J., concurring). Such a conclusion is possible either if a policy tangibly benefits a religious cause more than any other, or if the observer would believe that a desire to promote religion led to the policy.

The majority discounts the possibility that a facially neutral policy could have the primary effect of advancing religion. One must look beyond the text of a policy, however, to determine its likely effects. The analysis "requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion." Wallace, 472 U.S. at 74, 105 S. Ct. at 2499 (O'Connor, J., concurring in the judgment); see also Allegheny, 492 U.S. at 629, 109 S. Ct. at 3120 (O'Connor, Brennan, & Stevens, JJ., concurring in part and concurring in the judgment). This analysis reveals that both the policy itself, viewed in terms of the events leading up to its creation, and the prayers that result from it convey a message of religious endorsement.

Seen in context, the Duval County policy betrays a preference for religious expression despite the seeming neutrality of its terms. It is worth repeating a few details from the analysis of the policy's purpose. The chronology of events leading to the policy and the public pressure to keep prayer as part of the high school graduation ceremonies may not be conclusive evidence, but they inform the reasonable observer's understanding of the policy's purpose. The title of the policy itself, the bulk of the memorandum announcing it, and the fact that the policy only applies to the portion of the graduation ceremony traditionally reserved for prayer are even more telling. Together, these details have the effect of communicating to the reasonable observer that the Duval County authorities favored the inclusion of prayer in future graduation ceremonies.

The interpretation of the school principals reinforces this conclusion. The principals were the first recipients of the Graduation Prayer memorandum, the policy's first "reasonable observers." The principals were responsible for implementing the new policy; how they did so reveals their understanding of its meaning and purpose. In 1993 many principals allowed direct votes on whether to have a prayer during the graduation ceremony.[15] In other schools, officials directly asked the senior class chaplain to deliver a message

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[15]See R 1st Supp. Exs. (Stone Dep. at 16; Johnson Dep. at 8; Hite Dep. at 18-19).

during graduation.[16] Since 1993 it has been common for the official graduation programs to list the student speaker as Chaplain, and to use the religious terms "invocation" and "benediction" instead of "opening" and "closing message."[17] These programs are printed before the graduation ceremony without the benefit of reviewing the student's speech.

Beyond an observer's conclusions about the school administration's motives lies the policy's tangible result: it leads to more prayer at public events. Before the policy took effect, the Superintendent had responded to Lee by proscribing the traditional opening and closing graduation prayers. The new policy provided a mechanism to reestablish prayer in those portions of the ceremony. In the policy's first year, ten out of seventeen schools opted for some sort of prayer, meaning that it led to more prayer than all other forms of speech combined. And the inherent effect of prayer is to advance the religious beliefs of the speaker.[18]

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[16]See R 1st Supp. Exs. (Lockett Dep. at 11; Paulk Dep. at 20).

[17]Plaintiffs submitted copies of 45 graduation programs to the district court. Almost all use the terms "invocation" and "benediction," and most list the student speaker as the class chaplain. See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43 44, 45).

[18]The majority argues that the student speaker's speech is private, and thus cannot violate Lemon's second prong. I believe the opening and closing messages can be attributed to the State, but the disagreement is not

See Black Horse Pike, 84 F.3d at 1487; Harris, 41 F.3d at 458. The fact that prayers delivered as a result of the policy occur at a stage of the graduation ceremony carrying the strongest imprint of the state further exacerbates this impermissible effect.

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dispositive here. The Fifth Circuit addressed this point cogently in Santa Fe, holding that, "The mere fact that prayers are student-led or student-initiated, or both, does not automatically ensure that the prayers do not transgress Lemon's second prong.... [Wlhen the school 'permits' sectarian and proselytizing prayers ... such 'permission' undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion." 168 F.3d at 817-18. In a different context the Seventh Circuit has also held that private speech can violate Lemon's primary effects prong if private expression is associated with a government-controlled forum. See Freedom From Religion Found. v. City of Marshfield, -- F.3d --, No. 99-1639, (7th Cir. Feb. 4, 2000) (statue of Jesus on private land deemed part of surrounding public park for Establishment Clause purposes). The next section, focusing on the public forum doctrine, discusses this issue more thoroughly.

In support of its conclusion, the majority cites a number of Supreme Court cases for the proposition that "facially neutral programs [permitting] individuals to support religion through their own private choices" are constitutional. Those cases all involve the extension of a public benefit to families with children in private schools-- factual scenarios very different from Duval's graduation policy. Moreover, the programs at issue in those cases were constitutional because they did not influence families' choice to send their children to religious schools. See Agostini v. Felton, 521 U.S. 203,230-32,117 S. Ct. 1997, 2014 (1997); Witters v. Washington Dep't of Servs. for the Blind. 474 US. 481, 488, 106 S. Ct. 748, 752 (1986); Mueller v. Allen, 463 U.S. 388, 398-99, 103 S. Ct. 3062, 3068-69 (1983). This was because the programs distributed their benefits neutrally and comprehensively. A related point is that every family was able to make its own choice about its children's schooling under the government programs. Both of these attributes are missing in our case. The constraints of the Duval County policy influence the decisions about the graduation message, pushing students to opt for prayer. Furthermore, there is only one graduation ceremony. "Each student is not allowed to have the graduation she wants. Instead the decision is made by a majority of the senior class and imposed on a minority." Harris, 41 F.3d at 456.

C. The Public Forum Doctrine

Without deciding whether Duval County graduation ceremonies are public fora, the majority suggests that the public forum doctrine supports the constitutionality of the policy at issue in this case. I reject the analogy. According to the majority, the government does not control a private speaker's speech in a public forum, and private speech cannot convey a message of state endorsement. This may be an accurate statement of the law,[19] but it is of little use in this case, because Duval County's graduation ceremonies have none of the public forum's characteristics. In Lee v. Weisman, the Supreme Court noted that school authorities maintain close control over the program and speeches at

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[19]In fact five Justices have demonstrated an openness to the possibility that private speech in a public forum could violate the Establishment Clause. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772, 115 S. Ct. 2440, 2451 (1995) (O'Connor, Souter, & Breyer, JJ., concurring in result); id. at 807, 115 S Ct. at 2469. (Stevens, J., dissenting); id. at 817-18, 115 S. Ct. at 2474-75 (Ginsburg, J., dissenting). Only a plurality of the Court in an opinion written by Justice Scalia, took the opposite view. See id. at 770, 115 S. Ct. at 2450. Even the Scalia plurality acknowledged that the government could unconstitutionally manipulate an ostensibly public forum to favor religious speech. See id. at 766, 115 S. Ct. at 2449.

The Seventh Circuit reached this same conclusion, determining that a majority of justices had rejected a "per se" approach to Establishment Clause claims involving private speech in a public forum. See Freedom From Religion Found. The Seventh Circuit went on to hold that a city's sale of land with a religious statue violated the Establishment Clause even under the Scalia plurality's approach because it in effect granted preferential access to a public forum-the park surrounding the statue. See id. at *8.

graduation ceremonies.[20] 505 U.S. 577, 597, 112 S.Ct. 2649, 2660 (1992). This assumption is understandable, because graduation ceremonies have never been considered public fora. See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d Cir. 1996); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416, 418 (5th Cir. 1991), vacated on other grounds, 505 U.S. 1215, 112 S. Ct. 3020 (1992); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 838 (9th Cir. 1998), vacated as moot, 177 F.3d 789 (9th Cir. 1999) (en banc).

Public fora are places permitting broad access for the expression of diverse views. See Cornelius v. NAACP Legal Defense & Educ. Fund. Inc., 473 U.S. 788, 8023, 105 S. Ct. 3439, 3449 (1985);Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 954-55 (1983). See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757-58, 115 S. Ct. 2440, 2444 (1995). The "marketplace of ideas"' governs in public fora, which serve an important role both in facilitating the exchange of viewpoints and in providing a safe venue for new and marginalized ideas.

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[20]In Duval County for example, school officials often review the valedictorian's speech, and they plan or approve the entire graduation program. See R 1st Supp. Exs. (Reynolds Dep. at 21; Epting Dep. at 26-27; Lockett Dep. at 11) (review of valedictory speeches); id. (Epting Dep. at 28-29; Reynolds Dep. at 39; Stone Dep. at 9-10). The graduation policy allows these practices to continue.

Duval County certainly did not create a public forum by allowing a single student to deliver an uncensored opening or closing message. An essential characteristic of public fora is that they permit extensive public participation, or at least general access to the relevant class of potential speakers. See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 1641-43 (1998); Cornnelius, 473 U.S. at 802-04, 105 S. Ct. at 3449-50; Perry Educ. Ass'n., 460 U.S. at 47, 103 S. Ct. at 956; Greer v. Spock, 424 U.S. 828, 838 n. 10, 96 S.Ct. 1211, 1217 n. 10 (1976). The majority cites a number of cases permitting religious groups to use school facilities or funds, or public parks, but their holdings depended on the fact that use of the fora by a "broad spectrum" of groups eliminated any potential message of endorsement or preference for religion.[21] See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839-42, 115 S.Ct. 2510, 2521-23 (1995); Capitol Square, 515 U.S. at 762-63, 115 S. Ct. at 2447; Board of Educ. of the Westside Community Sch. v. Mergens, 496 U.S. 226, 252, 110 S. Ct. 2356, 2373 (1990) (O'Connor, J., plurality opinion); Widmar v. Vincent, 454 U.S. 263, 274, 102 S. Ct. 269, 277 (1981).

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[21]Furthermore, none involved speech at a government-sponsored and controlled event. The possibility that someone will conclude that the state is endorsing the content of a speech is much lower when the government allows an organization to use a classroom after school hours than when the government organizes a presentation and invites an audience. Certainly students could organize a private prayer meeting on school grounds before the official graduation ceremony, but that is not the issue here.

Duval County, however, has implemented no "open microphone" policy at its graduation ceremonies. The graduation policy permits only one speaker at the opening and closing, so there can be no diversity of views communicated in the messages. Selecting speakers through a majority vote also runs counter to the notion of "general access" necessary for a public forum and limits the possibility that the resulting speech will offer a fresh perspective to the audience. When the student speaker delivers the opening or closing message at a Duval County graduation, she is largely preaching to the converted.[22]

D. Appellants' As-Applied Claims

During the hearing for a preliminary injunction, the district court raised the possibility of advancing the trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2).[23] In an order dated the same day, the court did so,

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[22]It is true that in a public forum with open access and diverse expression, it would be difficult for the government to manipulate speech and there is little danger that an audience will believe the speech carries the government's imprimatur. This insight from public forum law, however, suggests a corollary that highlights the graduation policy's problems: at a non-public forum that is highly regulated by the government, there is both an elevated danger of government control over speech and a significant risk that the audience will associate the speech with the government.

[23]Federal Rule of Civil Procedure 65(a)(2) provides:

> (2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may

consolidating the trial on the merits with the preliminary injunction hearing and entering final judgment for the Duval County School Board. The majority claims Appellants waived their as-applied claims by consenting to the consolidation. This interpretation of Rule 65(a)(2), however, is without support in the case law or the record from the district court.

If a party consents to a Rule 65(a)(2) consolidation, it cannot later complain about the consequences-the limited time to prepare and the curtailed opportunity for discovery. See Fenstennacher v. Philadelphia Nat'l Bank, 493 F.2d 333, 337 (3d Cir. 1974). But the majority cites no case for the proposition that advancing the trial on the merits eliminates claims that would have benefitted from thorough discovery. Instead, a court enters final judgment on all claims after a Rule 65(a)(2) consolidation based on whatever limited evidence is before it at that time.

Nothing in the district court order advancing the trial on the merits or in transcript of the preliminary injunction hearing suggests that the judge or the parties intended

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> order the trial of the action on the merits to be advanced and consolidated with the hearing of the application [for a preliminary injunction]. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any right they may have to trial by jury.

otherwise. No one disputes that in their complaint the Appellants pleaded facts pertaining to graduation ceremonies between 1993 and 1997 and included an as-applied claim.[24] Immediately after broaching the possibility of a Rule 65(a)(2) consolidation at the preliminary injunction hearing, the district judge acknowledged that Appellants had a claim for damages.[25] At no time during the hearing did the judge suggest he was dismissing the as-applied claims as waived.

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[24]See RI, Tab I (Verified Complaint ¶¶ 24, 30, & at p.14) (making factual allegations about graduation ceremonies between 1993 and 1997, raising an as-applied Establishment Clause claim, and praying for damages on behalf of students
who graduated after 1993).

[25]The dialogue went as follows:

> THE COURT: All right. The next question is why shouldn't I, under Rule 65(a)(2) of the Federal Rules of Civil Procedure, order that the consideration of this case on its merits be advanced to this stage procedurally and decide the case and send it on to the Court of Appeals?
>
> MR. SHEPPARD: I think the Court certainly has that discretion. I think that it may be-well, I've said what I said.
>
> THE COURT: Well, you have a damage claim. I understand that.
>
> MR. SHEPPARD: Yes, sir. We would want to take some discovery with regard to that, would be my view.

See R1, Tab 30, at 29 (Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction).

In its order advancing the trial on the merits, the district court directed the Clerk to enter final judgment for the Defendants without distinguishing between the facial and as-applied claims.[26] The order made scant reference to the facts of the case, and the assertion in the order that Appellants' counsel "stipulated that the operative facts remain[ed] unchanged"[27] since 1994 is unsupported by the record. In fact, during the preliminary injunction hearing the Appellants' counsel made substantial reference to the evidentiary exhibits already filed with the court and expressed the need for further discovery.[28] The order focused on whether the law had changed since 1994, when the same district judge upheld the constitutionality of the graduation policy in an earlier lawsuit, see Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994), and the court concluded that it had not. Given its interpretation of Establishment Clause and Free Speech jurisprudence, the details of the graduation ceremonies in Duval County seemed unimportant.

Appellants did not waive their as-applied challenge to the graduation policy; the district court entered judgment

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[26]R1, Tab 27 at 3-4.

[27]Id. at 2.

[28]See R1, Tab 30, at 14-16, 29 (Transcript of Hearing on Plaintiffs' Motion for Preliminary Injunction).

for the Appellees on that claim. This may or may not have been the correct disposition, because the district court did not have a thorough record of the policy's application.

There is a difference between having a thin record, however, and having no evidence at all. Appellants filed dozens of graduation programs from the years 1994-1998 and the affidavit of Karen Adler in support of their motion for a preliminary injunction in this case,[29] and the district court also took judicial notice of the record from the earlier case concerning the Duval County policy.[30] The record includes the transcript of sectarian prayers delivered at graduation ceremonies as well as official programs that contained printed prayers, referred to the "student message" as an "invocation," and indicated that ministers have continued to deliver prayers at some Duval County graduations long after Lee.[31] In fact, Appellants maintain that although they would welcome the opportunity for

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[29]See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, with 58 exhibits); R1, Tab 12 (Adler Aff.).

[30]R1, Tab 26 (Order on Various Motions).

[31]See R2 (Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Exs. 4, 5, & 13 (religious expression printed in official program); 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45 (reference-to "invocation," "benediction," or "chaplain" in the program); 30 (minister delivered prayer).

more discovery, the record supports a reversal in their favor on all claims.

The procedural posture of this case is awkward at best. It is understandable that both the district court and this court would want to focus, without complications, on the important question of the graduation policy's facial constitutionality. It is not right, however, for the as-applied claim of Duval County students to disappear without a trace.

Conclusion

Duval County has not adopted a blanket approach of neutrality toward religion or eliminated school sponsorship and control over graduation ceremonies. Rather, the policy at issue in this case evinces a desire to maintain the graduation ceremony's traditional invocation and benediction in the wake of Lee. The policy does not explicitly mention religion and does not require any speech at all, but its terms nonetheless promote religious expression. To be more specific, the policy encourages the delivery of a prayer during a stage of the graduation ceremony when the content seems most "official" and when officials' control over audience participation is at its highest. This violates the Constitution. The Establishment Clause bars the government from encouraging religious expression, either overtly or subtly, and from conveying a message,

intentional or not, of endorsement for religious speech.[32] Moreover, the policy utilizes the vote to further its purpose, and in so doing corrupts the most cherished of democracy's tools. For the government cannot delegate the authority to do what it could not do itself, and constitutional rights are not subject to the whims of an electoral majority. For the foregoing reasons, I dissent from the majority's opinion.

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[32]Nothing in this dissent suggests that all religious expression at a public high school graduation would run afoul of the Establishment Clause. Graduation ceremonies are state-sponsored events controlled by school officials, however, and to disconnect (rather than just distance) themselves from any religious views expressed by speakers, school officials must be able to articulate a neutral criterion for selecting speakers unrelated to the potentially religious content of their speech. This would ensure both that school officials do not use their influence over the graduation program to promote religious beliefs and that the audience does not view religious views expressed by speakers as state sanctioned. Thus, the valedictorian could thank God or share the role faith played in her life. Furthermore, religious expression that is not part of the graduation program raises no Establishment Clause concerns. Audience members could pray quietly in their seats, and students could organize a prayer service immediately before or after the graduation ceremony.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (VOLUME II)

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August 8, 2001

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PUBLISH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
5/11/99
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-2709

D.C. Docket No. 98-460-Civ-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-460-Civ-J-10C

EMILY ADLER, individually; on behalf of herself and all persons similarly situated, SETH FINCK, individually; on behalf of himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(May 11, 1999)

Before HATCHETT, Chief Judge, MARCUS, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

HATCHETT, Chief Judge:

Appellants, students of various grade levels in the Duval County, Florida school system, challenge the Duval County school system's policy of permitting graduating students to vote on whether to have unrestricted student-led messages at the beginning and closing of graduation ceremonies as facially and as-applied violative of the Establishment Clause. We hold that this policy facially violates the Establishment Clause, reverse the district court's denial of appellants' motion for pre injunction and dismissal on the merits and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Prior to 1993, public schools in Duval County, Florida, permitted religious officials to conduct formal prayers during graduation exercises. The Supreme Court, however, ruled in 1992 that school-sponsored prayer at public school graduation ceremonies violated the Establishment Clause. Lee v. Weisman, 505 U.S. 577 (1992). Following Lee, Duval County Public School Superintendent Larry Zenke, at the direction of Vicky Reynolds (the school system's Liaison for Legal Affairs), issued a memorandum instructing all school officials in the Duval County school system to end the practice of having prayer at graduation ceremonies.[1]

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[1]The memorandum (dated July 22, 1992) read, "This memorandum is to remind you that due to the recent Supreme Court Ruling in Lee v. Weisman, there should be no prayer, benediction, or invocation at any graduation ceremonies.

Soon after issuing this memorandum, the school system began receiving input from students and members of the community regarding ways to continue prayer at graduation ceremonies despite the Lee decision.[2] Reynolds

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[2]For example, Calvin Carr, the High School Director for First Baptist Church in Jacksonville, wrote the following letter (dated March 3, 1993) to Reynolds:

> Thank you for being patient with me as I continue to "fish" for ways to incorporate prayer in our graduation ceremonies. I want you to know that I see it as a tragedy to allow one year to go by without having prayers - something that's been done in our country for over one hundred years.
>
> I am enclosing a copy of a bulletin that has been published from the Center for American law and justice. In that publication they allege that the Lee vs. Weisman case only stops school officials from inviting clergy to give prayers. Evidently Justice Kennedy made it clear for the majority that the court's decision was limited to the particular facts before the court (id. at 2655). Thus, any change from the factual situation presented in Lee might alter the resulting opinion of the court.
>
> Also, it points out that one Federal Appeals Court has already ruled that a majority of students can do what the state acting on its own cannot do to incorporate prayer in public school graduation ceremonies. Vicky, I'm not trying to be a 'stick-in-the-mud.' I just want to find a legal way our young people can have prayer at their graduations. It is going to be a sad day when we wipe them out of Duval County. Please help me to understand these rulings in this bulletin and I greatly appreciate your concern and help.

Other evidence of this community pressure includes a memorandum that Reynolds circulated entitled "Legal Opinion-Graduation Prayer" to

and Superintendent Zenke met to decide whether they could change the school system's policy of no prayer at graduation ceremonies because of this input and the Fifth Circuit's decision in Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993). Thereafter, Reynolds, under the supervision of Superintendent Zenke, circulated the following memorandum dated May 5,1993, referenced "Graduation Prayers," to all high school principals in the Duval County school system:

> You will recall that after the 1992 Supreme Court case of Lee v. Wiseman, [sic] you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school

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Duval County School Board Members that stated:

> For about a month my office has been receiving calls from principals asking for guidance as to the status of prayers at graduation. Students and parents had been informing them that there had been a change m the status due to a recent Court case and that student-led and initiated prayer was now acceptable.

desire to have some type of brief opening and/or closing message by a student.

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest with the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

After issuance of this memorandum, the Duval County School Board met to decide whether they could adopt a policy allowing a "moment of silence" at graduation ceremonies. In their discussion of the "moment of silence" policy, the School Board members also discussed the guidelines set forth in the Reynolds memorandum, and the permissibility of prayer at graduation ceremonies. The School Board voted the "moment of silence" policy down, in part to allow the guidelines in the Reynolds memorandum to stand, and in part based upon their understanding of Wallace v. Jaffree, 472 U.S. 38 (1985).[3]

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[3]At the June 1, 1993 meeting in which the School Board considered the "moment of silence" policy, the School Board members voted the policy down 4-3. The comments of those School Board members that opposed the moment of silence, however, show that their intention in denying a moment of silence was to permit the individual schools to utilize the guidelines from the Reynolds memorandum.

> Parker: But in good conscience I cannot vote to allow our '93 graduating class to have a few minutes of silent meditation when we all know that in the past some one has prayed out loud to thank the Lord for the 12 great and successful years in school during this period of time. And now we want silence.... I think that our school principals should be allowed to work out a non-message with our student chaplains, or a guest minister, rabbi or whatever that would be acceptable to all at this very important time in our young people's fives.
>
> Buckley: If we leave it [the Reynolds memorandum] as it is

The School Board never voted specifically on the guidelines set forth in the Reynolds memorandum; "that

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we have not told anybody to do anything or prevented them from doing anything. And that's what I feel we should do. ff we pass this motion as it is on the floor we are putting ourselves into it and saying you shall not pray. You shall have a moment of silent meditation and therefore we are injecting ourselves into what is happening at graduation. And I think the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony.

Corwin: God is not going away. Neither is our godly heritage for which American patriots sacrificed their lives and fortune from the time of the American revolution through Desert Storm. Americans who believe this have rights, too. The free public education system in America is based on the principles of good citizenship. I truly believe that this Board is dedicated to the premise that acceptable standards of conduct be formed in our students including self respect and respect for others regardless of race or religion. I also believe that the democratic process in which seniors were given the ability to choose which form of inspirational message, if any, they wanted at their commencement was an appropriate one and I'm going to stand by it.

Jordan: In 1962, the Bible went out of the school and in 1992-93 the bullets come in. You don't have to be a brain surgeon to figure out that where we're going in America, black and white, rich and poor, Hispanics, Asians, what have you, our security is threatened. There is an old saying if you like what you're getting, keep doing what you're doing. And how long is it going to be before someone challenges that the class of '93 is unconstitutional because the class of '93 is named after the year of our Lord, 1993? Now how absurd are we going to take these special interest groups that are fanning their particular agenda at the expense of the best interest of this country? Mr. Chairman, I plan to vote for the administration plan and against the proposal that's on the table.

memorandum was left in force with the acquiescence or tacit approval of the Board as its official policy governing the 1993 commencement exercises." Adler v. Duval County Sch. Bd., 851 F. Supp. 446,449 (M.D. Fla. 1993) (Adler I).

High school principals in Duval County thereafter began implementing the guidelines in the Reynolds memorandum through delegating decision-making authority to graduating senior students at each school to determine: (1) whether they should allow student messages at the opening and/or closing of the graduation ceremony; and (2) who should give these messages. See Adler I, 851 F. Supp. at 449 n.4 (describing how each individual school delegated this decision-making authority). With regard to the 1993 graduation ceremonies, seniors at 10 of the 17 Duval county high schools opted for messages that constituted various forms of religious prayer. The seniors at the remaining 7 schools opted either for no message or for messages that were entirely secular. As the parties have not had the opportunity to develop the record fully for graduation ceremonies following 1993, it is unclear how subsequent graduating classes conducted the message portions of their graduation ceremonies.[4]

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[4]Appellants have submitted the programs from Duval County High School graduations for years subsequent to 1993. Some of these programs indicate that student "leaders" or "chaplains" gave "messages," "invocations" and "benedictions" at these ceremonies.

II. PROCEDURAL HISTORY

In June 1993, various Duval County public school students sued the Duval County school system, alleging that the policy embodied in the Reynolds memorandum constituted an establishment of religion and infringed on their free exercise of religion. These students sought equitable relief through a judgment that declared the policy unconstitutional and enjoined the Duval County School Board from permitting prayers at high school graduation ceremonies, and additionally sought money damages.[5] The students also sought to certify their action as a class action. The district court denied the motion to certify the class and granted summary judgment in favor of the Duval County school system, holding that its policy was constitutional. See Adler I, 851 F. Supp. at 451-56. The students appealed, and a panel of this court found that because the students had all graduated, their claims for declaratory and injunctive relief were moot. See Adler v. Duval County Sch. Bd., 112 F.3d 1475, 1477-78 (11th Cir. 1997) (Adler II). The Adler II court also held that the students waived their damages claim on appeal. See Adler II, 112 F.3d at 1480-81.

Appellants brought the instant action in May 1998 against the Duval County school system again alleging that the policy embodied in the Reynolds memorandum

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[5]These "original" plaintiffs consisted of the following students: Emily Adler, Laura Jaffa and Robin Zion. Robin Rand later joined the action.

constituted an establishment of religion and infringed on their free exercise of religion.[6] Appellants sought preliminary and permanent injunctive relief against the Duval County School Board from permitting, conducting or sponsoring any religious exercises, prayer and instruction within the Duval County Public School District including School Board-sponsored graduation ceremonies. Appellants also sought monetary damages and class certification. The district court, at the hearing on appellants' motion for a preliminary injunction, advanced the case on the merits because the action "presents precisely the same claims predicated upon the same constitutional theories or contentions [as Adler I]; and ... counsel stipulated that the operative facts remain unchanged." Adler v. Duval County Sch. Bd., No. 98-460-CIV-J-10C (M.D. Fla. May 27,1998). The district court denied appellants' motion for preliminary injunction and entered final judgment in favor of the Duval County School Board, holding that the law had not evolved in appellants' favor and that high school graduation ceremonies were designated, limited public fora.

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[6]Appellants in the instant action include: Emily Adler, a June 1998 graduate of Mandarin High School; Seth Finck, a June 1998 graduate of Stanton College Preparatory School; Stella Finck, as mother of Rachel Finck, planning to graduate from Stanton College Preparatory School in 1999, Aaron Finck, planning to graduate from Stanton College Preparatory School in2000 and Duval County Public School student Benjamin Finck; Roberta Nord, mother of Duval County Public School Students Lucy Nord, age 9 and Tyler Hurley, age 12, and Jonathon Rand, a June 1998 graduate of Stanton College Preparatory School.

III. ISSUE

The issue we discuss is whether the Duval County school system's policy of permitting graduating students to vote to have unrestricted student-led messages at the beginning and closing of graduation ceremonies is facially violative of the Establishment Clause.[7]

IV. DISCUSSION

A. Framework of Analysis

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. Amend. I.[8] The first problem that we must confront is the framework of analysis to use in determining whether a policy that permits students to vote on whether to have uncensored student-led messages at public school graduations violates the Establishment Clause. The long-established three-prong test for analyzing Establishment Clause challenges

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[7]Appellants also allege that the district court abused its discretion in consolidating the merits of their claim with the hearing on their motion for preliminary injunction. As appellants consented to this consolidation, we find no abuse of discretion.

[8]The Establishment Clause applies to the states through the Fourteen Amendment. See Everson v. Board of Educ. of Ewing, 330 U.S. 1,8 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). As long as state action is present, a lack of statutory authorization does not limit the reach of the Establishment Clause. See Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828 n.7 (11th Cir.), cert. denied, 490 U.S. 1090 (1989).

enunciated in Lemon v. Kurtzman provides that to survive an alleged violation of the Establishment Clause, the challenged statute or policy must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement with religion. See 403 U.S. 602, 612-13 (1971). In Lee v. Weisman, the Court declined to apply the Lemon test in holding that a policy of school-sponsored prayer at public school graduation violated the Establishment Clause, and instead found that the following "dominant facts" controlled their decision: (1) state officials directed the performance of a formal religious exercise at graduation ceremonies; and (2) even for those students who objected to the religious exercise, their attendance and participation in the state-sponsored religious activity "are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma." See Lee, 505 U.S. at 586.

Members of the Court and other commentators have questioned the continued vitality of the Lemon test.[9] In

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[9]See, e.g., Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 721(1994) (O'Connor, J., concurring) ("the slide away from Lemon's unitary approach is well under way."); Lee, 505 U.S. at 587 (["we] can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus, we do not accept the invitation... to reconsider our decision in Lemon v. Kurtzman."); Allegheny v. American Civil Liberties Union, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part) (questioning the Court's continued adherence to the Lemon test); Wallace v. Jaffree, 472 U.S. 38,112 (1985) (Rehnquist, J., dissenting) (stating that the Lemon test "has no basis in the history of the

Lamb's Chapel v. Center Moriches Sch. Dist. the Court stated that it had not overruled Lemon. 508 U.S. 384, 395 n.7 (1993) ("we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled."). Additionally, the en banc court in Chabad-Lubavitch of Georgia v. Miller held that "although [Lemon] has been criticized severely, it still controls our Establishment Clause inquiry." 5 F.3d 1383, 1388 (11th Cir. 1993) (en banc); see also Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1468-74 (11th Cir. 1997) (applying Lemon). Thus, we will conduct our Establishment Clause inquiry of the Duval County school system's policy under both Lee and Lemon. As the district court's final order for our review concludes that Adler I, granting summary judgment in favor of Duval County, remained the proper decision, we review this case de novo. See Taylor v. Food World, Inc., 133 F.3d 1419,1422 (11th Cir. 1998). We also take note of the Court's warning that "the constitutional rights of children...can neither be nullified openly and directly by [the] state...nor nullified indirectly by [it] through evasive schemes...whether attempted 'ingeniously or ingenuously.'" Gilmore v. City Montgomery, 417 U.S. 556, 568 (1974) (quoting Cooper v. Aaron, 358 U.S. 1, 17 (1958)).

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amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); Kent Greenwald, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct Rev. 323, 361 (1996) ("now that Lemon lacks any defenders on the Court, other judges would perform a shallow exercise were they to continue to apply its terms. They should recognize that the Supreme Court has definitely abandoned Lemon.").

B. Lee v. Weisman

In Lee v. Weisman, the Court analyzed the policy of the public school system in Providence, Rhode Island, that permitted school principals to invite members of the clergy to offer invocation and benediction prayers at formal graduation ceremonies for middle and high schools. See Lee, 505 U.S. at 580. In particular, the principal at Nathan Bishop Middle School invited a rabbi to offer the invocation and benediction at the school's graduation ceremony in 1989. The principal provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions" that the National Conference of Christians and Jews had prepared and advised the rabbi that the prayer should be nonsectarian. See Lee, 505 U.S. at 581. The Court found that the school held the graduation on its premises, the students "enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families" and that the students "stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." Lee, 505 U.S. at 583.

The Court ruled that this policy of permitting prayer at public school graduation ceremonies was unconstitutional under the Establishment Clause, stating:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for

> secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Lee, 505 U.S. at 586. The high school principal's involvement in composing and directing a formal prayer exercise led the Court to hold the prayer "bore the imprint of the state" and to conclude that the state's involvement in the prayer created a "state-sponsored and state-directed religious exercise in a school." Lee, 505 U.S. at 587, 590. Thus, for purposes of our analysis under Lee we shall examine: (1) the state's control of the graduation ceremonies; and (2) the student's coerced participation in the graduation ceremonies.

1. State Control

The overriding issue in this case is whether the Duval County school system's policy, which allows graduating students to vote on the decision whether to have unrestricted opening and dosing messages that students deliver at graduation ceremonies.,effectively dissociates any prayer that may occur at the graduation ceremonies from the state's control. Although this case is distinguishable from Lee, where high school principals chose a member of the clergy to deliver a prayer, the fact that the entanglement

is less obvious or intrusive does not save the school system's policy from a facial violation of the Establishment Clause.[10] Our review of Lee and cases from other circuits leads us to the conclusion that the delegation of the decision regarding a "prayer"or "message" to the vote of graduating students does not erase the imprint of the state from graduation prayer. Further, the Duval County school system developed this policy as an attempt to circumvent Lee and continue the practice of prayer, and to permit sectarian and proselytizing prayer, at graduation ceremonies.

The Duval County school system exerted tremendous control over the graduation ceremonies, in that the individual schools and the School Board: rented the facilities for the graduation; told the graduating students what they should wear; decided when the graduating students and audience could sit and stand; decided the sequence of events at the graduation; and designed and printed the program for the ceremonies. As the Lee Court observed, "[a]t a high school graduation, teachers and

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[10]In Engel v. Vitale, the Court spoke of less direct state control for Establishment Clause purposes:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

370 U.S. 421,430 (1962).

principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." Lee, 505 U.S. at 597. The individual schools' decisions not to censor the messages that the elected students gave at the beginning and closing of the graduation ceremonies fails to erase the overwhelming control that the schools exerted over the remainder of the graduation ceremony. In fact, students decided whether to have a message at graduation and who to deliver that message "only because school officials agreed to let them decide that one question." American Civil Liberties Union. of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1479 (3d Cir. 1995) (en banc.).

The Ninth Circuit in Doe v. Madison Sch. Dist No. 321 analyzed a school district's policy that permitted a school to invite four students, according to their academic class standing, to speak at their graduation ceremony, with the school administration barred from editing or censoring the students' remarks. See 147 F.3d 832, 834 (9th Cir. 1998), withdrawn and reh'g granted, 165 F.3d 1265 (9th Cir. 1999). The Doe court held that the policy was distinguishable from Lee:

> First, students - not clergy - deliver the presentations. Second, these student speakers are selected by academic performance, a purely neutral and secular criterion. Third, once chosen, these

> individual students have autonomy over content; the school does not require the recitation of a prayer, but rather leaves it up to the student whether to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement."

Doe, 147 F.3d at 835. The Doe court took note of Justice Souter's concurring opinion in Lee that two other Justices had joined, which stated:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver religious message, it would have been harder to attribute an endorsement of religion to the State.

Doe, 147 F.3d at 835 (quoting Lee, 505 U.S. at 630 n.8 (Souter, J., concurring)). The court held that this policy survived Lee for "when a state uses a secular criteria for selecting graduating speakers and then permits the speaker to decide for herself what to say, the speech does not bear the imprimatur of the State." Doe, 147 F.3d at 836.

We find Doe to be distinguishable on two points. The Doe court relied on the neutral selection of student speakers on the basis of their academic standing and the schools policy to permit those speakers to make a private choice about what to say. See Doe, 147 F.3d at 835 n.5

(emphasizing the private character of any decision to pray or speak on religious topics through the graduation program's printed disclaimer). This reasoning merely recognizes what the Court has made clear: "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Educ. of Westside Community Sch v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion). What the Doe court did not decide, however, is the following question:

> Can school boards allow students to decide by majority vote to have religious exercises at graduation? Such practice, as one commentator explained, creates a "danger that a majority will bring intimidating pressures to bear in favor of a particular religion," a danger that is not present when a school chooses a speaker through a neutral method and allows her to speak freely.

Doe, 147 F.3d at 836 n.7 (quoting Recent Case, 110 Harv. L. Rev. 781, 783 (1997)) (internal citations omitted). The Duval County policy permits graduating students to decide through majority/plurality vote whether a student volunteer shall give a message. Another distinguishing point is that the Duval County school system's policy restricts these messages to no longer than two minutes at the beginning and closing of the graduation ceremony. The Doe policy does not reveal the sequence in which the four

speakers spoke, but indicates that each of the four speakers spoke under the same circumstances. See Doe v. Madison Sch. Dist. No. 321, 7 F. Supp.2d 1110, 1112 (D. Idaho 1997), aff'd, 147 F.3d 832 (9th Cir. 1998). The Duval County school system's policy thus exerts more control over the student speakers.

The Third Circuit en banc in Black Horse Pike considered a policy that permitted students to vote on the direct question of whether to have prayer at their graduation ceremonies, and held that such a policy violated the Establishment Clause. 84 F.3d at 1477-88.[11] The Black Horse Pike court took particular offense to the requirement "to have us recognize a right in that plurality to [permit verbal prayer at graduation ceremonies], and ignore the right of others to worship in a different manner, or in no manner at all." Black Horse Pike, 84 F.3d at 1477. Instead, the Black Horse Pike court held that "[a]n permissible practice can not be transformed into a constitutionally

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[11]The policy, in pertinent part, allowed for prayer under the following conditions:

> 1. The Board of Education, administration and staff of the schools shall not endorse, organize or in any way promote prayers at school functions.
>
> 2. In the spirit of protected speech, the pupils in attendance must choose to have prayer conducted. Such prayer must be performed by a student volunteer and may not be conducted by a member of the clergy or staff.

Black Horse Pike, 84 F.3d at 1475.

acceptable one by putting a democratic process to an improper use." Black Horse Pike, 84 F.3d at 1477; see also Board of Educ. of Kiryas Joel, 512 U.S. at 698-700 (holding that the state cannot transform a practice that tends to establish religion into a secular one through delegating some aspect of the practice to nongovernmental actors); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447,455 (9th Cir. 1994) ("elected officials cannot absolve themselves of a constitutional duty by delegating their responsibilities to a nongovernmental entity."), vacated as moot, 115 S. Ct. 2604 (1995). As the Lee court stated, "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us." 505 U.S. at 596.

Although the policy that the Black Horse Pike court analyzed is distinguishable because the students voted on the direct question of prayer, its analysis of the policy's attempt to dissociate prayer from the state's imprint is persuasive. When we analyze the Duval County school system's policy, we find evidence of the policy's intent to permit prayer: (1) Reynolds and Superintendent Zenke originally instructed all schools to stop directing prayer at graduation ceremonies under Lee and devised the current policy after pressure to develop a way to circumvent Lee's prohibition of school-sponsored prayer at graduation ceremonies; (2) they entitled the memorandum embodying the policy "Graduation Prayers"; (3) the School Board voted down a moment of silence to permit these guidelines to

remain in place; and (4) unlike a valedictory address, a two-minute "message" at the beginning or end of a graduation ceremony is more likely to result in prayer.[12] Thus, we find that the school system believed it could give a "wink and a nod" to controlling Establishment Clause jurisprudence through attempting to delegate to the majority/plurality vote of students what it could not do on its own - permit and sponsor sectarian and proselytizing prayer at graduation ceremonies. The Establishment Clause simply does not allow this. As the Court stated in West Virginia State Board of Educ. v. Barnette,

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . . fundamental rights may not be submitted to vote; they depend on the outcome of no election.

319 U.S. 624, 638 (1943).

We also consider these students state actors for Establishment Clause purposes. In Evans v. Newton, the Court held that the line between private and state action "is

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[12]The Adler I court realized that messages at the opening and closing of a graduation ceremony would likely lead to prayer when it stated that "[i]nvocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies." Adler I, 851 F.Supp. at 453 n.9.

not always easy to determine" and that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action." 382 U.S. 296, 299 (1966). The Evans Court also explained that when the state permits private groups or individuals to exercise governmental functions, the group or individual then must be subject to constitutional limits. See Evans, 382 U.S. at 299; see also Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (holding that when the state is a joint participant in the activity, the activity "cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment"); Harris, 41 F.3d at 455 ("[w]hen the senior class is given plenary power over a state-sponsored, state-controlled event such as a high school graduation, it is just as constrained by the Constitution as the state would be."). Accordingly, even the elected student speaker's independent choice of a topic is a choice fairly attributable to the state and, just as publically-elected school board president could not make a "private decision" to lead the public schools in a recitation of a prayer every morning, neither may the senior class's elected representative make a private decision to do the same thing from the graduation podium. See, e.g., Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160,1167 (7th Cir.) ("[i]magine that the Gideons came to ... schools ... every morning to lead students in prayer. Is there any doubt that such morning prayers would be permissible ... no matter that the prayers

were led by non-school employees?") (internal citations omitted), cert. denied, 508 U.S. 911 (1993).

We also find the reliance of the district court and the Duval County school system upon the Fifth Circuit's reasoning in Jones v. Clear Creek Indep. School Dist. to be unpersuasive. See Adler I, 851 F. Supp. at 456. The policy in Jones is similar to the one at bar, with the primary difference being that the Jones guidelines instructed that the invocation and benediction "shall be nonsectarian and nonproselytizing." See Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416, 417 (5th Cir. 1991), vacated, 505 U.S. 1215 (1992).[13] The Jones court held that the policy "does not unconstitutionally endorse religion if it submits the decision of graduation invocation content, if any, to the majority vote of the senior class." Jones, 977 F.2d at 969. The court premised its holding on the idea that "a graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government, choice." Jones, 977 F.2d at 969. The district court in Adler I followed this reasoning, stating that "the participants clearly understand that the student messages are just that student messages that are divorced entirely from any governmental

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[13]The other major differences between the two policies are that: (1) the Jones policy referred to invocations" and "benedictions," while the Duval County policy referred to "opening and closing messages"; and (2) the senior class principal in Jones had the power to advise and counsel the senior class. Jones, 930 F.2d at 417.

or institutional sponsorship." Adler I, 851 F. Supp. at 456. We disagree. Based on our analysis above, the state cannot erase its control over or endorsement of prayer at a public school graduation through delegation of one portion of the graduation ceremony to the majority/plurality vote of students. Further, we believe (as we shall discuss further in the "coerced participation" factor) that a reasonable student will not realize that student-elected sectarian and proselytizing prayerful messages at graduation ceremonies are divorced from state sponsorship and instead, realizing the views to be that of the majority, will feel coerced to participate in them.

Additionally, the Fifth Circuit clarified its Establishment Clause jurisprudence in Doe v. Santa Fe Indep. Sch. Dist., in which it held that a Jones graduation policy that did not contain the limitation that invocations and benedictions be nonsectarian and nonproselytizing violated the Establishment Clause. See Santa Fe, 168 F.3d 806, 816 (5th Cir. 1999).[14] The court held that Jones 'did not

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[14]The Santa Fe court also held that a policy of prayer at high school football games also violated the Establishment Clause. See Santa Fe, 168 F.3d at 824. The graduation ceremony policy that the court reviewed is as follows:

> The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation

hold that a policy is insulated from constitutional scrutiny under the Establishment Clause merely because it permits, rather than requires, religious speech when selected and given by students," and that the content restrictions were "central" to Jones's holding. Santa Fe, 168 F.3d at 815-16. Although the Santa Fe court bypassed a formal Lee analysis, it held that

> when the school "permits" sectarian and proselytizing prayers - which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint and which... do not serve (and even run counter to) the permissible secular purpose of solemnizing an event - such "permission" undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion.

Santa Fe, 168 F.3d at 817-18. As the Duval County school system's policy in fact "permits" sectarian and proselytizing prayers, it is therefore distinguishable from Jones and fits within Santa Fe's holding. Further, Santa Fe holds that a school's delegation to students the decision whether to have some type of "message" at a graduation

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ceremonies.

See Santa Fe, 168 F.3d at 811-12. The policy also had a "fallback," which provided that if a court enjoins the school district from enforcing the policy, then it would utilize the nonsectarian and nonproseltyzing limitation. See Santa Fe, 168 F.3d at 811-12.

ceremony does not insulate the school from constitutional scrutiny.

We hold that the state's control over nearly all aspects of the graduation ceremony, and the choices of a student-elected representative, subjects the ceremony to the limits of the Constitution. We further hold that this policy does not dissociate student-initiated sectarian and proselytizing prayer at a school-controlled graduation ceremony from the imprint of the state under Lee, and that the state's endorsement of the prayer subjects it to a facial violation of the Establishment Clause. Accordingly, we hold that the control that the Duval County school system exercised is sufficient to satisfy the state control "dominant fact" under Lee.

2. Coerced Participation

The second "dominant fact" under Lee is an easier issue. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise ...." Lee 505 U.S. at 587. The Lee Court discussed coerced participation at a graduation ceremony as follows:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful

> silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.... But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is not less real.

Lee, 505 U.S. at 593. Because a student's attendance at his or her graduation ceremony is "in a fair and real sense obligatory," the Lee court held that students "had no real alternative which would have allowed [them] to avoid the fact or appearance of participation [in prayer]." Lee, 505 U.S. at 586, 588. Additionally, "[t]he prayer exercises ... are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." Lee, 505 U.S. at 598.

The Duval County school system's graduation policy, and the school's control over the graduation ceremony, require students to remain silent and perhaps even stand for the duration of the message. Thus, because the school system devised this system so that prayer could occur at graduation ceremonies, this coerced participation violates the Establishment Clause. The Court stated in Engel that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect pressure upon religious minorities to conform

to the prevailing officially approved religion is plain." Engel, 370 U.S. at 431. Further, because the graduation speaker under the Duval County school system's policy won an elective contest to speak, the audience is much more aware that the views expressed are those of the majority and, according to Lee the audience faces even greater compulsion to participate. See, e.g., Black Horse Pike, 84 F.3d at 1481 ("[the First Amendment] is not a sword that can be used to compel others to join in a religious observance at a state sponsored event."). The Lee Court emphasized the importance of graduation as a "once-in-a-lifetime" event and that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." Lee, 505 U.S. at 596. Thus, we hold that the Duval County school system's policy coerces objecting students to participate in prayer, thereby satisfying Lee's coerced participation "'dominant fact."

C. Lemon v. Kurtzman

We next analyze the Duval County school system's policy under the three-prong Lemon test. Under Lemon. we must ask whether: (1) the Duval County school system had a secular purpose for adopting the policy; (2) the policy's primary effect is one that neither advances nor inhibits religion; and (3) the policy does not result in an excessive entanglement of government with religion. See Lemon, 403 U.S. at 612-13. The Duval County school system's policy violates the Establishment Clause if it fails to meet any of

these criteria. See Edwards v. Aguillard, 482 U.S. 578,585 (1987).

1. Secular Purpose

The first prong of the Lemon test requires us to determine whether the challenged policy has a "clearly secular purpose." Wallace, 472 U.S. 38,56 (1985). We must ask "whether [the] government's actual purpose is to endorse or disapprove of religion." Wallace, 472 U.S. at 56 (internal quotations omitted); See also Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) ("[secular purpose] is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes."); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514,1527 (11th Cir. 1993) ("no legislative recitation of a supposed secular purpose can blind us to an enactment's pre-eminent purpose.") (internal quotations and citations omitted), cert. denied, 513 U.S. 807 (1994). Although the policy's purpose need not be exclusively secular, it must be sincere and not a sham. Edwards, 482 U.S. at 586-87.

The appellants presented the following evidence to show that the Duval County school system's policy did not have a clearly secular purpose: (1) the Duval County school system drafted this policy in response to community support for prayer at graduation ceremonies and as an attempt to "fish" for ways around Lee; (2) Reynolds entitled the memorandum that enunciated this policy "Graduation

Prayer"; and (3) the comments of the School Board members evidence their intent that instead of a moment of silence, the individual schools should adopt the policy to permit graduating students to engage in prayer. In Jager v. Douglas County Sch. Dist., this court held that a policy that permits religious invocations at public high school football games "by definition serve[s] religious purposes" and therefore does not have a secular purpose. See 862 F.2d 824, 829-30 (11th Cir.), cert. denied, 490 U.S. 1090 (1989). The Jager decision dictates that when a public school policy's actual purpose is religious - even intrinsically religious - the policy violates the secular purpose requirement under Lemon. See lager, 862 F.2d at 830 (discussing cases that conclude that "an intrinsically religious practice cannot meet the secular purpose prong of the Lemon test").

The district court erred in failing to follow Jager. See Adler I, 851 F. Supp. at 452 n.8 (questioning the value of Jager). We hold that the policy, both on its face and based upon the history surrounding its inception, has an actual purpose to permit prayer - including sectarian and proselytizing prayer - at graduation ceremonies. See Santa Fe, 168 F.3d at 816 (holding that a policy that permits sectarian and proselytizing prayers has "a purpose which is the antithesis of secular."). In fact, prayers were the direct consequence of this policy, as the Duval County school system's 1992 policy - that directly outlawed prayer would have banned them. See Black Horse Pike, 84 F.3d at 1479-80 ("[t]he text of [the policy] was adopted in response to Lee. The Board's avowed purpose in reexamining its policy was

to provide an option that might allow the 'longstanding tradition' of graduation prayer to survive the prohibitions of that Supreme Court decision."). Thus, the policy violates the secular purpose requirement under Lemon. See Jaffree v. Wallace, 705 F.2d 1526,1534 (11th Cir. 1983) ("[r]ecognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied."), aff'd, 472 U.S. 38 (1985).

We also take exception with the district court's conclusion that graduation ceremonies are "designated, limited public fora." Adler I, 851 F. Supp. at 454. The district court held that

> [t]raditionally, the ceremonies are held at the coliseum, away from the school campuses, and virtually the entire program is given over to public speech making by the valedictorian and other leaders of the graduating class, and by community leaders who are invited to give the principal commencement address.

Adler I, 851 F. Supp. at 454. We agree with the Black Horse Pike court that "[h]igh school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged." Black Horse Pike, 84 F.3d at 1478; see also Doe, 147 F.3d at 838 ("the graduation ceremony is not a public forum"). The individual schools exert great control over the graduation

ceremonies and the policy did not broaden the right of students to speak at the graduation ceremonies. Instead, only students that the majority selected could give a brief opening and closing message. "No matter what message a minority of students may wish to convey, the graduation forum is dosed to them." Harris, 41 F.3d at 457. Because the graduation ceremony is not a public forum, we hold that the district court's reliance on public forum cases - and their corresponding requirement of strict scrutiny review is incorrect.[15]

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[15]The Adler I court relied upon Chabad-Lubavitch, a case in which the en banc court reversed the denial of a group's request to erect a menorah in the Rotunda of Georgia's Capitol Building. See Chabad-Lubavitch, 5 F.3d at 1385-86. The court specifically found that "[o]ver the past decade, Georgia has opened the Rotunda to Georgia's citizenry for their expressive activities both secular and religious in nature." Chabad-Lubavitch, 5 F.3d at 1386. The Chabad-Lubavitch court was careful to distinguish itself from Jager, because "Jager involved state-sponsored religious speech in a nonpublic forum; quite different from the private religious speech in a public forum in the instant case." ChabadLubavich 5 F.3d at 1393 n-16. A high school graduation ceremony is not "open" to its participants for expressive activity, and the policy's permitting two elected student representatives to give a message does not transform the graduation ceremony into a designated public forum. See also Alabama Educ. Television Comm. v. Forbes, 118 S. Ct. 1633,1642 (1998) ("[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."). We also hold that a public school graduation ceremony is not a "limited public forum" because limited public forums "are those areas that the government has created for use by the public as places for expressive activity." Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1548 (11th Cir. 1997) (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)); see also Santa Fe, 168 F.3d at 821 ("even though the government may designate a forum only for particular speakers or for the discussion of particular topics ... [the school district's] restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a

2. Primary Effect

Even if we assume that the Duval County school system's policy survives the first Lemon prong, we also hold that the policy is facially unconstitutional because it fails the primary effect prong. The primary effect prong requires us to ask "whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." Wallace, 472 U.S. at 56 n.42 (quoting Lynch, 465 U.S. at 690)). We must use the viewpoint of the "reasonable observer" to determine if the principal or primary effect of the policy is one "that neither advances nor inhibits religion." Lemon, 403 U.S. at 612. In undertaking this analysis, we must also be mindful that this consideration is especially important in the context of public school children. See Edwards, 482 U.S. at 583-84.

The primary effect of the Duval County school system policy is to permit prayer at graduation ceremonies. Before 1992, schools in Duval County coordinated prayer at graduation ceremonies. After Lee, Superintendent Zenke and Reynolds instructed schools no longer to permit prayer at their graduation ceremonies. After pressure from the community and the Fifth Circuit's Jones decision, Superintendent Zenke and Reynolds released a memorandum entitled "Graduation Prayer" that permitted

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public forum - limited or otherwise - at least not with fingers crossed or tongue in cheek."). The Duval County school system did not establish its graduation ceremonies for public use; instead, it chose all of the speakers except the elected student(s).

students to decide through majority/plurality vote whether to have student-led "messages" at the beginning and closing of graduation ceremonies. In 1992, 10 of the 17 graduation ceremonies had student prayer. A reasonable observer at a graduation ceremony would believe that the 'Graduation Prayer" policy conveys an endorsement of prayer - as the schools in the Duval County school system did openly prior to 1992 - which advances religion. See Jaffree, 705 F.2d at 1534-35 ("[t]he primary effect of prayer is the advancement of one's religious beliefs."); Santa Fe, 168 F.3d at 818 (holding that schools permitting sectarian and proselytizing prayers "undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion."). Further, the policy can place those attending graduation ceremonies "in the position of participating in a group prayer," which also violates the primary effect prong of Lemon. See Jager, 862 F.2d at 831.

3. Entanglement

Because the policy dearly fails the first two prongs of Lemon, we need not engage in an analysis of Lemon's third "entanglement" prong.

V. CONCLUSION

Based on the foregoing, we hold that the Duval County school system's policy of permitting graduating students to decide, through majority/plurality vote, whether to have

student representatives give unrestricted messages at the beginning and closing of graduation ceremonies facially violates the Establishment Clause under Lee and Lemon. Therefore, we reverse the district court's judgment in favor of appellees, and we remand this case so that: (1) appellants can pursue discovery on the events at graduations after 1993 for their as-applied challenge and damages; (2) the district court may consider the motions of intervenors; and (3) the district court may undertake further proceedings consistent with this opinion.[16]

REVERSED and REMANDED.

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[16]For purposes of the appellants' as-applied challenge on remand, we direct the district court to consider, along with newly-discovered evidence, the record evidence of school-directed prayer at graduation ceremonies. The limited record shows that many of the programs from school graduations indicate that "chaplains" gave "invocations" and "benedictions" during which the graduation programs directed the audience to stand. Additional record evidence shows that speakers at some of the graduation exercises were not selected using wholly secular criteria and students voted directly on the question of whether to have prayer at graduation ceremonies. In one instance, a faculty member delivered a prayer. Evidence of this sort clearly violates Lee.

KRAVITCH, Senior Circuit Judge, Specially Concurring:

I concur in both the reasoning and result of the majority opinion; on its face, the policy of the Duval County School Board violates the Establishment Clause of the First Amendment as the Supreme Court has interpreted it in both Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992) and Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971). Contrary to the dissent's characterizations, the grounds of the majority opinion are quite narrow, and I write separately only to emphasize the particular points that I believe dictate the outcome of today's decision.

I. Lee v. Weisman

As the majority opinion succinctly observes, the Supreme Court rested its decision in Lee on two "dominant facts": (1) "[s]tate officials direct[ed] the performance of a formal religious exercise" and (2) even for objecting students "attendance and participation in the state-sponsored religious activity [were] in a fair and real sense obligatory." Lee 505 U.S. at 586, 112 S. Ct. at 2655. In Lee, a high school principal decided to include a prayer at graduation, selected a local rabbi to deliver the prayer, and instructed the rabbi that the prayer be nonsectarian, giving him a copy of "Guidelines for Civic Occasions" to assist him in choosing appropriate material. Id. at 581, 112 S. Ct. at 2652. It was this unabashed state involvement in composing and directing a formal prayer exercise that led the Court to find that the prayer "bore the imprint of the State," id. at 590, 112 S. Ct. at 2657, and to conclude that the principal's practice created a "state sponsored and state-directed religious

exercise in a public school," id. at 581, 112 S. Ct. at 2655. As the Lee Court held that the prayer, delivered from the podium during the graduation ceremony, constituted a formal religious exercise, the difficult question in the present case is whether a student speaker's decision to pray under similar circumstances is attributable to the state.

Under most circumstances, the Establishment Clause presents no obstacle to a student's decision to pray on school premises or during a school event. Contrary to popular belief, the courts never have interpreted the Establishment Clause to prohibit any individual student from praying, for example, before a meal or before a test.[1] The dissent suggests that the majority comes "perilously close" to adopting such a course of action in the context of public high school graduations, Dissent at 1, but this case presents no occasion to rewrite settled Establishment Clause jurisprudence, and today's decision neither aspires to nor achieves that result.[2]

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[1]See generally Daniel N. McPherson, Student-Initiated Religious Expression in the Public Schools: The Need for a Wider Opening in the Schoolhouse Gate, 30 Creighton L. Rev. 393 (1997) (discussing the "flagpole prayer" where students spontaneously congregate to pray).

[2]In particular, I object to the dissent's contention that the majority opinion would outlaw all private religious expression at a graduation, see Dissent at 1, and the suggestion that our decision prevents a speaker from discussing religion themes or thoughts, id. at 9, 31-32 & n.8. Our decision today, as the Supreme Court's decision in Lee, concerns prayer - a formal religious exercise - delivered at the state's direction from the podium at a high school graduation. See Lee, 505 U.S. at 586 & 89, 112 S. Ct. at 2655 & 56 (describing prayer as a formal religious exercise); lager v. Douglas County Sch. Dist., 862 F.2d 824,830

The majority opinion acknowledges that, under some circumstances, a student's individual decision to pray from the podium at a high school graduation may be constitutional. Cf. Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998) (upholding a policy that permitted the top four students to speak on any topic of their choosing without state approval), withdrawn & reh'g granted, 165 F.3d 1265 (9th Cir. Mar. 19, 1999).[3] As the parties to this case have emphasized, the Establishment Clause applies only to the federal and state governments and has no effect on prayer that *genuinely is* private in character. The majority opinion recounts - in convincing detail - why the Duval County School Board's policy produces speech of a public rather than private character, and I will not repeat that analysis here.[4]

(11th Cir. 1989) (explaining that prayer is the quintessential religious practice). I find nothing in the majority opinion that supports the dissent's concerns regarding such extreme further implications or consequences.

[3]We need not decide today whether the now-vacated Madison decision was correct or even persuasive. Nor must we conjure up a host of hypothetical circumstances under which the Madison panel's reasoning would be more or less convincing. Today's opinion properly limits the scope of our decision to the circumstances of the policy presently under review.

[4]Although the policy sets forth secular criteria for selecting speakers, even the limited record presently available includes disturbing allegations and evidence that the speakers who addressed the audience at graduation ceremonies pursuant to the policy were not selected according to wholly secular criteria and, in at least one case, was not a student but a member of the faculty. As the majority opinion observes,

I acknowledge that the Fifth Circuit's decision in Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), which holds that "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies," is at odds with the reasoning of our opinion today. Id. at 972. In my view, the Jones decision to uphold a student vote to include prayer at a high school graduation, and in particular the specific language quoted above, strains the boundaries of Lee and conflicts with the Supreme Court's decision in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86 (1943) (explaining that the protections of the Bill of Rights are not subject to waiver on the basis of a majority vote). Moreover, to the extent Lee requires us to evaluate considerations of psychological coercion, it seems to me that a prayer from the lips of a popularly elected student representative is far more likely to coerce audience participation than one from a member of the clergy selected by the school principal.

H. The Continuing Relevance of Lemon v. Kurtzman

Although the Supreme Court's Lemon decision has been the target of much academic and judicial criticism, Lemon remains the law of the land and of this circuit. See Maj. Op. at 12 (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384,395 n.7,113 S. Ct. 2141,2148 n.7

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conduct of that nature plainly falls within the Supreme Court's proscriptions in Lee.

(1993); Chabad-Lubavitch v. Miller, 5 F.3d 1383,1388 & n.8 (11th Cir. 1993)).[5] Notwithstanding Lemon's continued vitality as part of our general Establishment Clause jurisprudence, it is not immediately obvious that we still should apply Lemon's analysis, *in addition* to the more specifically applicable analysis in Lee in case that involve prayer at high school graduations. Upon examination, however, I am convinced that Lemon remains binding law even in this particular area.[6]

Beginning with the Supreme Court's four opinions in Lee, I note that the only opinion that declares the Lemon test irrelevant to the issues at hand is that of the dissent.[7] See

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[5]The Supreme Court has continued to apply Lemon by name and did so as recently as two terms ago. See Agostini v. Felton, ___ U.S. ___, 117 S. Ct. 1997, 2015 (1997). Following the Court's lead, we also have continued to apply the Lemon test in Establishment Clause cases. See Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464,1468 (11th Cir. 1997).

[6]As the majority explains, to survive scrutiny under the Lemon test, the challenged policy must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion. See Lemon, 403 U.S. at 612-13, 91 S. Ct at 2111 (1971).

[7]Two of these same dissenters (Justices Scalia and Thomas), as well as Justice Kennedy, expressed concern about the Court's opinion in Lamb's Chapel, joined by two of the Lee dissenters (Justices Rehnquist and White), which "resurrected" Lemon. See Lamb's Chapel, 508 US. at 395 & n.7,113 S. Ct. at 2148 & n.7 (applying Lemon and adding that the Court has not overruled the case); id. at 397,113 S. Ct at 2149 (Kennedy, J.,

Lee, 505 U.S. at 644, 112 S. Ct. at 2685 (Scalia, J., dissenting). Although Justice Kennedy's majority opinion recounts the analysis of the district and circuit courts, both of which declared the policy in question unconstitutional under the Lemon test, the opinion pointedly sidesteps Lemon.[8] Rather than accepting the invitation of both the petitioning school principal and the Solicitor General to overrule or modify Lemon, the majority declared that it need not address the case because the state involvement in the prayer and coercion present in Lee made it an easy case that the Court could "decide without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured." Lee, 505 U.S. at 587,112 S. Ct at 2655. By suggesting that the Establishment

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concurring in judgment) (calling the majority's citation of Lemon "unsettling" and "unnecessary"); id. at 398,113 S. Ct at 2149 (Scalia, J., dissenting) (likening Lemon to a "ghoul in a late-night horror movie that repeatedly sits up in its grave ... after being repeatedly killed and buried"). More significantly, Justice Scalia subsequently has conceded error in his eulogy for Lemon and has observed (albeit with considerable dismay) that, despite the Court's recent fondness for deciding Establishment Clause cases without reference to Lemon, the lower courts are not free to ignore the case because they may not discard Supreme Court precedent at will. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687,750-51,114 S. Ct 2481,2515 (1994) (Scalia, J., dissenting).

[8]Justice Blackmun's concurring opinion traces the evolution of the Court's Establishment Clause case law, including the development of the Lemon test, and declares that nothing in the majority opinion conflicts with the established jurisprudence. See Lee, 505 U.S. at 600-04,112 S. Ct at 2662-64 (Blackmun, J., concurring). Justice Souter's concurrence also cites Lemon with approval but does not address the continued viability of the test. Id. at 627,112 S. Ct. at 2676 (Souter, J., concurring). Justices Stevens and O'Connor joined both concurrences.

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Horse Pike dissenters agreed that deference to precedent required the court to apply Lemon in addition to Lee. Id. at 1493 (Mansmann, J., dissenting). The Ninth and Seventh Circuits also have assumed, without discussion, that the Lemon test continues to apply to graduation prayer cases and have applied Lemon in addition to Lee. See Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836-38 (9th Cir. 1998), withdrawn & reh'g granted, No. 97-35642,1999 WL 160831,165 F.3d 1265 (9th Cir. Mar. 19, 1999); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447,457-58 (9th Cir.), vacated as moot, 515 U.S. 1154, 115 S. Ct. 2604 (1994); id. at 460 n.4 (Wright, J., dissenting) (disagreeing with the result but noting the applicability of the Lemon test); Tanford v. Brand, 104 F.3d 982,986 (7th Cir. 1997) (applying Lemon in addition to Lee in a challenge to prayer at a university graduation). Similarly, the district court in this case applied both Lemon and Lee. See Adler v. Duval County Sch. Bd., 851 F. Supp. 446,450-51 (M.D. Fla. 1994) ("Adler I"). In short, although some courts and individual judges have disagreed over what manner of prayer the Supreme Court's precedents might permit at a public graduation, to our knowledge no court nor single judge has published an opinion that even suggests that Lemon is no longer applicable to cases involving graduation prayer or that Lee presents the only acceptable or relevant analysis.

Finally, even were we to accept *arguendo* the dissent's suggestion that the Lemon test is inapplicable to cases involving prayer at high school graduation and "unnecessary" to evaluate Duval County's policy, Dissent at

5, no authority suggests that we may ignore the underlying principles of Lemon, developed in cases both before and after the Supreme Court decided that case.[10] In 1947, almost 25 years before Lemon, the Supreme Court explained that the Establishment Clause "means at least" that the state can neither "force nor influence" its citizens to attend or refrain from attending any church. Everson v. Board of Educ., 330 U.S. 1, 15, 67 S. Ct. 504, 511 (1947). Indeed, the Supreme Court's holding in Lee easily could be read as nothing more than a reaffirmation of that narrow principle: the state may not coerce (or, more controversially, encourage) its citizens to participate in formal religious exercises.

Similarly, in a case decided three years before Lemon, the Supreme Court relied on the state's religious purpose in enacting a statute to strike down a state law that the teaching of evolution in public schools. See Epperson v. Arkansas, 393 U.S. 97, 107-09 & n.16, 89 S. Ct. 266, 272-73 & n.16 (1968) (quoting a campaign advertisement that supported the statute). Although the state's motivation, "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man," id. at 109, 89 S. Ct at 273, was more extreme than the school board's purpose here, the difference is one only of degree; both practices violate

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[10]See, e.g., Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 361 ("What courts and lawyers should do instead [of applying Lemon] is focus on narrower principles relevant for particular circumstances, drawing these principles partly from the very Supreme Court cases decided under the Lemon test").

the broader principle that the state may not act with the primary purpose of advancing religion.

The Supreme Court repeatedly has reaffirmed this principle in the years since Lemon by applying it in the context of that framework. In Stone v. Graham, for example, the Court rejected the Kentucky state legislature's "avowed" secular purpose for posting the Ten Commandments in public schools and declared the practice unconstitutional because it found that the state's purpose was "plainly religious in nature." 449 U.S. 39, 41, 101 S. Ct. 192,194 (1980) (per curiam). Similarly, in Wallace v. Jaffree, the Court twice struck down Alabama laws requiring a moment of silence in public schools because the legislature passed them solely for religious purposes. See 472 U.S. 38, 105 S. Ct. 2479 (1985). Finally, in Edwards v. Aguillard, the Court relied on its own reading of a statute that constrained the teaching of evolution in public schools and the statements of the state legislator who sponsored the law to declare the state's alleged secular purpose a sham. See 482 U.S. 578, 585-95 & n.15, 107 S. Ct. 2573, 2578-83 & n.15 (1987). The Court struck the law down because its primary purpose was to advance religion and it therefore had no "clear secular purpose." Id. at 585, 107 S. Ct. at 2573. See also Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829-30 (11th Cir. 1989) (dismissing the state's asserted secular purpose and striking the state's practice of permitting prayer over a public address system at high school football games as unconstitutional because its actual primary purpose was to advance religion).

This case forces us to decide whether the school board violated the Establishment Clause by attempting to make an end-run around Lee when the board's policy has the dearly evidenced, primary purpose and effect of advancing prayer (and thus religion) at public graduations. The Supreme Court's cases, both before and after Lemon, suggest that such a policy cannot survive constitutional muster, and even Justice Kennedy's majority opinion in Lee contains some (albeit admittedly scant) support for the proposition that the object of the state's exercise may not be to advance religion.[11] On the record available to us in this case, the evidence convincingly demonstrates that the school board acted with the purpose of permitting a student speaker to lead the audience in prayer at high school graduations. In addition to the historical backdrop and the contemporaneous statements of policy makers,[12] the plain terms of the policy

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[11]The relevant passage provides:

> The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

See Lee, 505 U.S. at 588-89,112 S. Ct. at 2656 (emphasis added).

[12]Neither the Supreme Court nor our own court has felt compelled to ignore record evidence regarding historical realities or the contemporary statements of policymakers in evaluating the religious purpose of a particular policy under Lemon. See Aguillard, 482 US. at 585-95 & n.15,107 S. Ct. at 2578-83 & n. 15; Wallace v. Jaffree, 472 U.S. at 56-59,105 S. Ct at 2489-91; Church of Scientology v. City of Clearwater, 2 F.3d 1514,1527,1530-34 (11th Cir. 1993); majority notes, the district court

indicate the school board's primary purpose to permit prayer. The policy allows a two minute message at the beginning and/or end of the ceremony; one need not be clairvoyant to predict that prayer is the most natural "message" this format is likely to produce. Indeed, one only need be a historian; during the only year for which we have evidence in the record, the policy produced student-led prayer from the podiums of ten out of seventeen graduation ceremonies. Under such circumstances, I believe that the principles crafted in the cases discussed above require us to hold the policy unconstitutional, without regard to Lee or even specific citation to Lemon.

Having concluded that Lemon v. Kurtzman has survived as a matter of general Establishment Clause jurisprudence and that the case's three-pronged analysis -or at least the principles underlying that analysis -remains relevant on the more particular question of prayer at public high school graduations, it remains only to say that I agree with the majority's application of the Lemon framework to the facts of this case. In my view, the religious purpose and effect of the school board's policy are plain in the record and on the face of the policy; the policy, therefore, cannot stand.

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committed error when it acknowledged that our decision in later relied upon such evidence but ignored the case on this point in part because the Jager panel was not unanimous. See Adler I, 851 F. Supp. at 452 n.8. just as split decisions from the Supreme Court bind all lower courts, district courts are not free to disregard circuit precedent on the ground that a particular panel did not speak with one voice.

MARCUS, Circuit judge, *dissenting:*

The court today holds that the Duval County school system's policy of permitting graduating students to vote on whether to select a student to deliver an unrestricted message at the opening or closing of a high school graduation ceremony violates the Establishment Clause of the First Amendment. The majority finds Duval County's policy facially unconstitutional simply because the school sponsors the ceremony and provides the platform and opportunity for a student to deliver a message that may or may not have any religious content. In the process, the majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony, no matter how neutral the process of selecting the speaker may have been, nor how autonomous the speaker was in crafting his message. By somehow transforming a private speaker into a state actor and a student's message into the state establishment of religion, the majority has, I believe, misapprehended the Supreme Court's Establishment Clause jurisprudence, and has ignored the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion). I therefore, respectfully dissent.

I.

The central issue presented in this case is whether the Establishment Clause dictates that every form of religious expression be eliminated from graduation ceremonies, no matter who may express it. The majority recognizes, as it must, that the Supreme Court has never levied a per se ban on all religious expression at high school graduation ceremonies, and it appears to accept, at least in a general way, that in the public school context, Establishment Clause jurisprudence is of "necessity one of fine-drawing," Lee v. Weisman, 505 U.S. 577, 598 (1992), "sometimes quite fine, based on the particular facts of each case," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). Indeed, the majority opinion begins its discussion, as it must, with an examination of Lee v. Weisman, where the Court had occasion to visit for the first time the question of school prayer at a high school graduation ceremony. In Lee, Justice Kennedy, writing for the majority, took special care 'to recognize that, at graduation time and throughout the course of the education process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." Lee, 505 U.S. at 598-99 (citing Board of Educ. v. Mergens, 496 U.S. 226 (1990)); see also id. at 630 n.8 (Souter, J., concurring) (citing Witters v. on Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986)).

Instead of purging graduation ceremonies of all prayer,

Lee calls for the difficult task of separating a student's private message, which may be religious in character, from the school board's religious speech, protecting the former and prohibiting the latter. Close attention to the Duval County policy leads me to the conclusion that the policy is facially constitutional.

A.

The facts needed to measure the facial constitutionality of the School Board's policy are straightforward, uncontroverted, and laid out fully by the district court in Adler v. Duval County School District, 851 F. Supp. 446 (M.D. Fla. 1994) ("Adler I"), vacated as moot, 112 F.3d 1475 (11th Cir. 1997) ("Adler II").[1] Invocations, benedictions, and

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[1]My views are based on Duval County's policy as written, not as applied. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Whether there are serious constitutional questions regarding the application of the policy at certain graduation programs remains to be seen, but I do not think we are in the best position to resolve these issues now. As I understand the procedural history of the case, the district court's consolidation of the action on the merits with the hearing on appellants' motion for preliminary injunction prevented appellants from fully developing the record for graduation ceremonies after 1993. On May 28, 1998, when it consolidated the action, the district court took judicial notice of its opinion in Adler I, 851 F. Supp. 446 (M.D. Fla. 1994). Because the consolidation truncated discovery, the record consists almost entirely of material derived from Adler I. This record is of little aid to the appellants claiming money damages for injuries sustained at graduation ceremonies in 1995 (Joshua Weihnacht), 1997 (Monica Juodvalkis), or 1998 (Emily Adler, Seth Finck, Jonathan Rand, and Bonnie Bear), because

other religious prayers or messages were traditionally offered by clergy and others at public high school commencement ceremonies in the Duval County School District. In 1992, following the decision in Lee v. Weisman (holding that a Providence, Rhode Island school principal, acting in accord with school board policy, violated the Establishment Clause by inviting a local clergyman to deliver a nonsectarian prayer at graduation), the Duval County Superintendent, Larry Zenke, instructed Vicki R. Reynolds, the school district's legal affairs officer, to research the issue further. Reynolds advised Superintendent Zenke that it would be permissible for principals to allow student-initiated and student-led prayer during graduation ceremonies if the school authorities were not involved in the decision-making process. See Adler I, 851 F. Supp. at 448.

On May 5, 1993, she issued a memorandum ("The Reynolds Memorandum") to all high school principals,

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the manner in which the policy was applied in 1993 and 1994 has no relevance to the appellants' claims for money damages. In Adler II, 112 F.3d 1475 (11th Cir. 1997), we stated that "[w]hether [the students] are entitled to damages depends entirely on the circumstances under which the prayer was delivered at their graduation ceremony." Id. at 1479-80. Thus, in order to recover monetary damages, an appellant needs to demonstrate that the prayer given at his or her graduation ceremony was delivered in an unconstitutional fashion, regardless of whether the policy itself is unconstitutional. See id. at 1479. I don't believe this analysis can be made as the record now stands. Therefore, I agree with the majority opinion that whether the policy passes facial constitutional muster or not, the case should be remanded to allow appellants to pursue discovery on events occurring after 1993, and to permit the district court to conduct a factually based as-applied analysis. See, e.g., Bowen v. Kendrick, 487 US. 589,591 (1988).

which remains the operative policy for student messages at graduation ceremonies in the Duval County School District. The Reynolds Memorandum provides in part:

> You will recall that after the 1992 Supreme court case of Lee v. Wiseman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or dosing message by a student.
>
> This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees;

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

Id. at 449.

In 1993, under this policy, ten of seventeen high school graduation ceremonies had some form of student delivered religious message. At the other seven graduations, there were no student messages at all or the messages were entirely secular in character. See id. at 449-50. There is no

tabulation in the record of comparable statistics for subsequent graduations.

B.

Lee v. Weisman presents the analytical framework against which to measure the Duval County policy, and resort to Lemon v. Kurtzman, 403 U.S. 602 (1971), may be unnecessary. But whether measured against the Lee framework or Lemon, to my thinking, the policy passes facial constitutional muster. In Lee, Justice Kennedy wrote that "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the City of Providence is an unconstitutional one. We can decide the case without reconsidering the general framework by which public school efforts to accommodate religion are measured." 505 U.S. at 586-87. The conclusion that we should measure the policy at issue by comparing it to the Lee analysis is bolstered by the concurring opinions of Justices Blackmun and Souter and the dissent of Justice Scalia. Notably, none of the Justices employed the Lemon test in Lee.

Justice Blackmun, concurring in an opinion joined by Justices Stevens and O'Connor, formulated the applicable test in these terms: "[n]early half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization nor may it obtrude itself in the internal affairs

of any religious institution." Id. at 599 (Blackmun, J., concurring). Justice Souter, also concurring in an opinion joined by Justices Stevens and O'Connor, likewise did not apply Lemon's three-part test. For him the "principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community." Id. at 627 (Souter, J., concurring). Finally, dissenting, Justice Scalia, writing for himself, Chief Justice Rehnquist, and Justices White and Thomas, observed that the Court's opinion had demonstrated the "irrelevance of Lemon by essentially ignoring it ... and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." Id. at 644 (Scalia, J., dissenting).

In Lee, the Supreme Court pointed at two "dominant facts" as marking the boundaries of its decision: first, the Providence school officials ordained and directed the performance of a religious exercise by deciding to include prayer in the graduation ceremony, by selecting a clergyman to deliver the prayer, and by providing the clergyman with guidelines informing the content of the prayer; second, pressure was exerted on students to attend graduation and conform with their peers. See id. at 586-88. What the Supreme Court found troubling about Lee was that the government clearly directed a formal religious exercise - albeit in the form of a nonsectarian prayer - under such circumstances as to oblige the participation of many who objected. As Justice Kennedy wrote:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586. There can be little doubt, then, that in Lee, the Providence, Rhode Island school system ordained and established a religious exercise at a graduation ceremony. The graduation prayer delivered by a rabbi was in every sense the state's prayer.

In striking contrast, under the Duval County policy, however, neither the School Board nor its principals may ordain, establish or direct that a prayer or a message of any kind shall be delivered at graduation. Indeed, the Duval County policy explicitly divorces school officials from the decision-making process as to whether any message - religious or not - may be delivered at graduation. Moreover, under the policy, the School Board and its agents have no control over who will draft the message, if there be any message at all, or what its content may be. According to Duval County policy, school officials merely allow the graduating class to decide whether or not to have a speaker

deliver a message at graduation, and, if so, it's left to the student body to select that speaker. Indeed, the special concurrence concedes that the policy "sets forth secular criteria for selecting speakers." Special Concurrence at 3 n.4. The School Board does not suggest in any way, let alone require the graduating class to consider religious criteria or any other criteria in deciding whether or not to have a student speaker or in selecting the speaker. And most notably for me, if the graduating class chooses to have a message, the content of the message shall be prepared by the student speaker alone and no one else. The Duval County School Board is prohibited by the very terms of its policy from monitoring or otherwise reviewing the message in any way. On the face of the policy, the students unambiguously understand that any student message is utterly divorced from School Board sponsorship. In short, I cannot conceive of how a message delivered by a student under these circumstances can be characterized as the state's message or how a policy allowing the delivery of an autonomous message can be seen as the state direction of prayer.

The Supreme Court struck down the policy in Lee precisely because Providence school officials directed the performance of a "formal religious exercise." 505 U.S. at 586. The Court did not suggest that school sponsorship of the graduation event, standing alone, was sufficient to find the Providence policy unconstitutional, or it would have banned all religious expression at graduation. The majority here contends that the control exerted by the school district over the graduation ceremonies affixes the imprimatur of the

state on any religious message delivered by any student. While the majority opinion acknowledges that Lee is distinguishable from this case, it nevertheless concludes that the Duval County School Board policy fails to erase the imprint of the state from student messages at graduation ceremonies. Lee does not support this rationale for finding the School Board policy unconstitutional.

The majority's holding which, in essence, requires schools to banish religion from all events in which there is school control is far-reaching and goes further than the Establishment Clause requires. Following the majority's reasoning, the religious content of any speech at a graduation ceremony is likely attributable to the school merely because the school sponsors the event. As a result, schools would have to prevent any speaker, including speakers as diverse as athletes, politicians, academics, entertainers, maybe even judges, from discussing a religious topic or invoking the Lord's name, to ensure that no audience member perceives that the school is endorsing the speaker's religious message. By that logic, those speakers would bear the imprimatur of the state simply because they were selected by the school to speak at an event over which the school has great control. But a graduation free of all religious expression is not required by the Establishment Clause. The Supreme Court has repeatedly held that neutrality, not hostility, toward religious expression is required by the Establishment Clause. Indeed in Lee the Court recognized that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression

are too precious to be either proscribed or prescribed by the State." 505 U.S. at 589; see also Agostini v. Felton, 521 U.S. 203, 231 (1997) (observing that there is no advancement of religion where 'aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); Board of Educ. v. Grumet, 512 U.S. 687, 696 (1994) ("'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.'" (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973)); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."). What the Establishment Clause bars is state sponsorship of religion or prayer in the context of public school graduation ceremonies.

How then, does the majority opinion, or the special concurrence, propose to convert a private speaker who is selected through a wholly neutral process, and who is given complete autonomy over the content of her speech, into a public, state sponsored speaker? Two basic arguments are offered. First, the majority contends that by providing the

platform and opportunity, the state has created a sufficient link to the student speaker to convert the student's private speech into public, state sponsored speech. Second, both the majority and the special concurrence suggest that the process of selecting the speaker shrouds the otherwise private speech with the imprint of the state. The first argument - that by providing the platform, the speech becomes public - goes too far. The second -- that the speaker somehow gainers state authority by virtue of the plebiscite - has no logical rationale.

Even ff we accept that the Duval County School Board exerted "overwhelming control" over the graduation ceremony, it is clear that it did not have control over the elements which are most crucial in this calculus: the selection of the messenger, the content of the message, or most basically, the decision whether or not there would be a message in the first place. On the face of the policy, the students alone decide both whether there will be a message, and, fi so, who the messenger will be. By suggesting that the state has "directed" prayer, the special concurrence has misapprehended the School Board policy. Special Concurrence at 2-3 n.2. In essence, this case is indistinguishable from Doe v. Madison School District No. 321,147 F.3d 832 (9th Cir. 1998), withdrawn & reh'g en banc granted,165 F.3d 1265 (9th Cir. 1999), where the Ninth Circuit held that graduation speech does not bear the imprimatur of the state when the speaker is a student, not a cleric, the student speaker is selected on neutral and secular

criteria; and the student has complete autonomy over content.[2] See id. at 835-37.

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[2]The other cases that have considered student-initiated prayer at graduation are of limited assistance; none, except for Doe v. Madison School District No. 321, examine a policy which mirrors Duval County's in its neutrality. Notably, all of the other cases allow for students to vote directly on whether or not to have prayer at graduation. These cases either uphold or strike down such policies. Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), is the only case which has permitted students to vote directly on whether to have prayer at graduation. In the Fifth Circuit upheld the Clear Creek, Texas school district's policy allowing students to decide if they wanted volunteers to deliver "nonsectarian and nonproselytizing" invocations at graduation. See id. at 965. The court found that the Clear Creek policy reserved to the students the decision whether to have an invocation, precluded anyone but a student volunteer from delivering an invocation, and placed less psychological coercion on students than the prayers had on graduates in Lee because students were aware that any prayers given represented the win of their peers. See id. at 970-71.

The Fifth Circuit recently revisited the issue of student-initiated prayer in Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999). There the Fifth Circuit examined what it considered to be the holding of Jones - "that student-selected, student-given, nonsectarian, nonproselytizing invocations and benedictions at high school graduation ceremonies" are constitutional - and concluded that the constitutionality of a Clear Creek-type prayer policy depends on its "nonsectarian and nonproselytizing" features. Santa Fe, 168 F.3d at 811. The majority opinion relies on Santa Fe for the proposition that a policy which "permits" sectarian and proselytizing prayers is a priori unconstitutional. This argument proves too much and is offensive to the Constitution. The Duval County policy, of course, permits and proselytizing prayers because it places no limitations, either secular or sectarian on the content of a graduation message. A policy of free expression is far more consonant with the commands of the First Amendment than is a policy of censorship. See, e.g., Board of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (plurality opinion) ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur."); Santa Fe, 168 F.3d at 824-28 (Jolly, J., dissenting).

The majority insists that the delegation of responsibilities to nongovernmental actors does not altogether absolve the state of its constitutional duty. Stated at so high an order of abstraction, I can readily accept that premise. But the Duval County School Board in no way delegated any state authority to the students by providing them the opportunity to decide ff they wanted a student message, and to select a student speaker ff they so chose. The majority has in no way proven that the students' private conduct has become so "entwined with government policies" and so "impregnated with governmental character" as to become subject to the constitutional limitations placed on state action. Evans v. Newton, 382 U.S. 296, 299 (1966). In fact, the state's only involvement in the message is to

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In ACLU of New Jersey v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996) (en banc), the Third Circuit, sitting en banc, held unconstitutional a school board's policy that permitted the senior class to vote on whether to include a prayer at high school graduation ceremonies. See id. at 1477-88. The policy in Black Horse Pike allowed senior class officers to conduct a poll of the graduating class to determine, by plurality vote, whether seniors wanted "prayer, a moment of reflection, or nothing at all" to be included in their graduation ceremony. Id. at 1475. Finally, in Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1155 (1995), the high school students voted by written ballot on whether or not to have prayer, and, if the students voted for prayer, on whether a minister or a student would say the prayer. See id. at 452-53. The Harris court found that the state involvement in the case was pervasive enough to offend Establishment Clause concerns. The court noted that "[t]he message of the speakers is ... chosen by the majority; the relevant speakers are instructed to pray." Id. at 456-57.

In contrast to each of these policies, Duval County students vote on whether to have a message of unspecified content delivered by a student. This is the critical distinction.

provide students with the opportunity to vote, and to impose a time limit of two minutes. Neither of these facts establishes that the state has so insinuated itself into the decision that it can transform private speech into an utterance of the state. Nevertheless, the majority opinion goes so far as to suggest that the student's topical choice, which everyone concedes is made in a purely autonomous manner, is still attributable to the state, and says that this control cannot be erased through delegation of one portion of the ceremony. The majority opinion assumes what it cannot prove - that utterances made on a state platform are automatically transformed from private into public speech. It is beyond my imagination to say that everyone on the platform at a high school graduation ceremony, including a local politician or celebrity, is a state speaker merely because the state has provided the platform, onto which private individuals may be invited to share their privately held views. Such private speech does not become the state's merely by being uttered at a state event on a state platform.[3]

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[3]Simply providing a platform on a neutral basis is not enough to convert private action into state action. In a series of cases granting religious groups access to generally available facilities or benefits, i.e., "open forum" cases, the Supreme Court has suggested that the mere location or platform of religious speech is insufficient to transform private speech into the state's speech. The Court has, on numerous occasions, rejected the argument that the Establishment Clause allows restrictions on access by religious organizations to government programs or premises, otherwise open to all groups. By providing students who hold religious views with the same opportunity to enjoy generally available facilities and benefits, schools act neutrally. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (holding that the University of Virginia violated the Free Speech Clause when it

The Duval County policy permits graduating students to decide through majority/plurality vote whether a student volunteer shall deliver a message. It does not direct what the message will be. The state here coerces nothing - it merely offers to students the opportunity to vote for or against a message, but does not compel the answer. The majority opinion takes a neutral process and an autonomous speaker and recasts it as an arm of state coercion, even though there is no preordained religious result.

Nevertheless, the majority and the special concurrence would proscribe a policy that on its face plainly allows a student to select her own message, fearful that on occasion that message may be a prayerful one. It is worth repeating, however, that while the state cannot advance religion, similarly, it cannot act in a hostile manner in the face of private religious speech publically uttered. See Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760

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refused to pay for a religious student organization's publication costs under a program that funded other student organization publications); Lamb's Chapel v. Center Moriches Union Free Sch. Dist, 508 U.S. 384, 395 (1993) (striking down as violative of the Free Speech Clause a school district regulation authors use of school property for political, social civic, or recreational uses but denying religious groups the same access); Board of Educ. v. Mergens, 496 U.S. 226,235 (1990) (upholding Equal Access Act prohibiting public secondary schools which have a 'limited open forum' from denying access to students who wish to meet in that forum 'on the basis of the religious, political, philosophical or other content of the speech at such meetings"); Widmar v. Vincent, 454 U.S. 263, 273-74 (1981) (holding that a university regulation denying religious groups access to school facilities violated the Free Speech Clause; any benefits to religion by providing "equal access" to facilities would be "incidental").

(1995). If a per se rule is erected, that all speech on a platform is state speech, this rule would run afoul of the Free Exercise and Free Speech clauses.[4] If the senior class were asked to vote whether to have a student deliver a poem, or perhaps sing a song, at a graduation exercise, that act is still the selection of a private speaker through neutral criteria. The Duval County policy creates the mechanism whereby the students could elect to have a message and select the speaker and nothing more.

The majority and the special concurrence reason that the policy's delegation to students of the power to vote for a graduation speaker renders that speaker - by virtue of the vote - a state actor. It is this leap of logic, taking the selected student representative and, without explanation, turning her into a state actor, which cannot be sustained. In his concurrence in Lee v. Weisman, Justice Souter said that:

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[4]Duval County students possess Free Speech rights, even in a nonpublic forum such as a graduation ceremony. The Supreme Court has held that in nonpublic fora the government may not engage m viewpoint discrimination. See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788,806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."); Perry Educ. Ass'n v. Perry Local Educators' Assn, 460 U.S. 37, 46 (1983) (A "state may reserve [nonpublic] forum for its intended purposes ... as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). The Court has stated that religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Rosenberger, 515 U.S. at 831.

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of these speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

505 U.S. 577, 631 (1992) (Souter, J., concurring). In Adler, where the state has not even chosen the private speaker, we have even less than this. See also Doe v. Madison Sch. Dist. No. 321, 147 F.3d at 836 ("[W]hen a state uses a secular criterion for selecting graduation speakers and then permits the speaker to decide for herself what to say, the speech does not bear the imprimatur of the State.")

The argument is now that the student messenger is a state actor because the democratic process of voting by public school students somehow converts the selected speaker into a public official. But this student is, at most, a representative of the student body, not an official of the state. She is in no way analogous, as the majority opinion suggests, to the School Board president who is, unlike the student, a publically-elected official. She has no power or authority or official capacity to inform, carry out, or guide state policy. It remains unconvincing to argue that the student becomes a state actor because she was chosen by her peers, unless each high school student individually is considered to be a state actor, or somehow the students, acting in concert, come to be vested with the power of the state.

I offer two examples. First, consider the case of the selection of a Homecoming Queen. While she may be selected by a vote, or plebiscite of the entire senior class, the Homecoming Queen cannot be characterized as a state actor, or a representative of the state, merely because she holds a "public" position and sits atop the Homecoming float. Imagine, second, the example of replacing the traditional valedictory address with the practice of affording the students of the graduating class the opportunity to select the graduation student speaker through a vote by the entire class. In this hypothetical, the student speaker is selected, not by the School Board on the basis of grades, but by the students on the basis of student choice - be it popularity, ability to entertain, achievement in athletics, or for some other reason. It strains reason to suggest that, by virtue of her selection by the majority of the senior high school class, the student speaker becomes a mouthpiece of the state. Both examples suggest that the senior class' act of voting does not, in any way, turn the senior class vote into state action, nor turn the chosen student into a state actor. Because Duval County policy utilizes this same methodology, affording the students of the senior class, in a wholly secular way, the opportunity to vote whether or not to have a message and to select a student speaker, this vote is no more vested with the imprimatur of the state than are the votes for graduation class speaker or Homecoming Queen.

It is hard to understand how the principal, school board, or state has sponsored or directed the student speaker's actions when all of the central decisions - who speaks,

whether there will be a speaker, and what the content of the speech is - are uncontrolled by the state. Delegation of decision-making to pick a private speaker alone does not place the state's imprint on graduation prayer. The delegation provided to the students - whether or not to have a student message - can in no way be seen as the delegation to a nongovernmental actor of some aspect of a practice which tends to establish religion Where the student is chosen in a neutral and secular way and where the student is allowed complete autonomy over the message, the majority's position is untenable.

C.

The other dominant fact of Lee whether Duval County students are coerced "to support or participate in religion or its exercise," 505 U.S. at 587, by the School Board policy, is largely determined by the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself. I do not quarrel with the observations made in Lee, that students feel compelled to attend graduation, see id. at 595, and that schools "retain a high degree of control" over graduation ceremonies, id. at 597. But these conclusions do not suffice to decide the issue of coercion. The focus must be on whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, induces students to participate in a religious exercise.

Schools may make private religious speech their own by endorsing it, but schools do not endorse all speech that they do not censor. See Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion). We need not assume, as the majority does, that Duval County seniors will interpret the school's failure to censor a student message for religious content as an endorsement of that message. As we have noted, the students clearly understand, by the very terms of the Duval County policy, that any student message is utterly divorced from any School Board sponsorship. While there may still be pressures on students to attend graduation and conform with their peers, the state's control over a religious exercise, essential to Lee's holding, see 505 U.S. at 590 ("The degree of school involvement here made it clear that the graduation prayers bore the imprint of the state . . . ."); id. at 597 ("[T]he state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise...."), is absent here.

II.

While the majority opinion seems to acknowledge that the Duval County School Board policy should be measured against the framework of Lee - - a view I wholly share - - it also undertakes a brief analysis of the policy under Lemon v. Kurtzman. Even if we assume that Lemon provides the appropriate analytical vehicle against which to measure the Duval County School Board policy, the policy still withstands facial constitutional challenge. Under the Lemon

test, the policy must have a secular purpose, it may not have a primary effect that either advances or inhibits religion, and it must not foster an excessive government entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602,612-13 (1971). I believe that the School Board policy, on its face, has a secular purpose and violates neither of Lemon's proscriptions.

A.

The majority and the special concurrence can discern no secular purpose in the Duval County School Board policy, brushing aside without comment the purpose explicitly stated in the policy, "to allow the students to direct their own graduation message without monitoring or review by school officials." Likewise, it ignores the two secular purposes recognized by the district court "to solemnize the occasion and to observe and protect the right of free speech" of the student speaker. Adler I, 851 F. Supp. at 453.

Since Lemon provides that a statute must have "a secular legislative purpose," 403 U.S. at 612 (emphasis added), a statute will only violate the Establishment Clause if it is "entirely motivated by a purpose to advance religion," Wallace v. Jaffree, 472 U.S. 38, 56 (1985); see also Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (a court "may invalidate a statute only if it is motivated wholly by an impermissible purpose"); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only

when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."). A statute may satisfy Lemon's first prong even if it is "motivated in part by a religious purpose." Wallace, 472 U.S. at 56.

Moreover, the Supreme Court has instructed us to be "deferential to a State's articulation of a secular purpose," Edwards v. Aguillard, 482 U.S. 578, 586 (1987), particularly where "a legislature expresses a plausible secular purpose" for a policy or action, Wallace, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment). We respect that purpose unless it is insincere or a "sham," Edwards, 482 U.S. at 586-87; Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464,1468 (11th Cir. 1997), or where the statute at issue has a "preeminent purpose" which is "plainly religious in nature," Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam); see also Edwards, 482 U.S. at 591; Wallace, 472 U.S. at 56-60. But the Supreme Court has been reluctant to attribute an unconstitutional motive where a "plausible" secular purpose may be discerned from the statute. Mueller v. Allen, 463 U.S. 388, 394-95 & n.4 (1983).

Additionally, "inquiry into legislative purpose begins with interpreting the law itself." Church of Scientology v. City of Clearwater, 2 F.3d 1514,1527 (11th Cir. 1993). For the most part, statutes which the Supreme Court has invalidated for lack of secular purpose have openly favored religion or demonstrated a religious purpose on their face. See, e.g., Edwards, 482 U.S. at 593 (invalidating a Louisiana law that

required creationism to be discussed with evolution in public schools); Wallace, 472 U.S. at 57-58 (overturning an Alabama statute that authorized a moment of silence because the state made no attempt to justify the statute in terms of any secular purpose); Stone, 449 U.S. at 41 (striking down a Kentucky statute requiring the posting of the Ten Commandments in public classrooms); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding unconstitutional a New York law authorizing state-directed daily classroom prayer in public schools).

Three secular purposes are plainly encompassed by this policy. First, the Duval County policy, on its face, affords graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message. I do not understand how this purpose of allowing students to share in the decision-making process concerning the shape of their own graduation is denuded of a legitimate secular purpose, simply because an autonomous student speaker chosen by neutral criteria may express a prayerful message. The majority presumably would admit a legitimate secular purpose if the School Board had decided to allow students of the graduating class to select the student graduation speaker through class vote rather than by class rank. Doing so allows the graduating high school seniors to share civic responsibility in shaping their ceremony. The Duval County School Board has done no more here.

Moreover, the School Board policy evinces another legitimate secular purpose in allowing students to solemnize

the event as a se educational experience. See Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963,966-67 (5th Cir. 1992); cf. Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). This purpose is not vitiated of its secular character merely because the policy invites consideration of meaning and values in the context of a graduation ceremony. And it would be very damaging to public education if the Establishment Clause were to be seen as inhibiting any reflection by a student of transcendent meaning and value in life, whether grounded in religion or not.

Finally, the School Board's policy also evinces an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form. See Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); Board of Educ. v. Mergens, 496.S. 226, 249 (1990) (plurality opinion) ("[P]revent[ing] discrimination against religious and other types of speech" has an "undeniably secular" purpose); Americans United For Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538,1543 (6th Cir. 1992) (en banc) ("[A] policy of treating religious speech the same as all other speech certainly serves a secular purpose.").

Nevertheless, the majority opinion and special concurrence suggest that the policy has no "clear" or "legitimate" secular purpose, and posit three pieces of evidence to show that any avowed secular purpose is actually a "sham." First, the majority says that the School Board promulgated the policy as a means to evade the strictures of Lee; second, the policy's solely sectarian purpose is said to be established by examining the title of the Reynolds Memorandum, "Graduation Prayer"; and finally, the majority suggests that comments made by some members of the School Board, notably after the policy had been promulgated and distributed in Duval County, likewise evinces a wholly sectarian purpose.

In the process of erecting this argument, the majority opinion, without any authority, ignores the text of the policy and its explicitly stated secular purpose, as if there were none. The majority would divine a wholly sectarian purpose merely by looking at the antecedent history, the title, and the post-enactment debate. It would be an especially dangerous practice if a court could somehow discern legislative purpose, not from the text of the policy, nor from its explicitly stated purpose, nor even from a decision-making body that has offered no debate from which to find purpose, but, rather, simply from the controversy surrounding the subject and the heartfelt and often conflicting views expressed by many members of the community. A review of the pertinent history, however, yields only the observations that Duval County had a long tradition of clergymen offering prayers at commencement ceremonies, that in the

wake of Lee in 1992, the School Board terminated the practice, and that thereafter, many members of the community expressed strong views about the policy one way or the other. "[W]hile it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth, . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite." Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

In this case we have no record from which to fairly infer the motivation of those who promulgated or distributed the policy. In so far as we attempt to divine purpose from the decision-makers, "to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds)," the district court found that the purposes or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds Memorandum of May 5." Adler I, 851 F. Supp. at 451. To the extent that we focus on the motives of Mr. Zenke or Ms. Reynolds, the district court found mixed motives or purposes - to permit students to solemnize the event, to afford the student body the opportunity to select a messenger, who, in turn would, with complete autonomy, choose a secular or sectarian message, and to afford the students the option of having no message at all. See id. at 452. The majority opinion offers no reason to disturb the

district court's findings which are grounded in the facially neutral language of the Reynolds Memorandum.

The majority opinion also suggests that the title of the Reynolds Memorandum, "Graduation Prayer," supports the conclusion that the School Board policy was driven solely by sectarian concerns. The title, however, merely introduces the topic of debate within Duval County in the aftermath of Lee rather than suggesting, let along compelling, the outcome of that debate. The title affixed to the Reynolds Memorandum does no more than alert the reader to the general subject matter of the text; but it remains the language and substance of the policy, rather than its title that is controlling. It is altogether unnecessary to requisition the title to cast doubt on the clear and unambiguous purpose of the policy. The crucial term "message" is fully defined by the text of the policy, which provides that the decision whether to have a message is left to the students, that the student body shall choose the student speaker, that the message is limited to two minutes in length, that the message shall take place at the beginning and/or closing of the graduation ceremony, and, finally, that the content of, the message shall be prepared by the student speaker without monitoring or review by the School Board. The title cannot take the place of a detailed review of the policy's facial provisions, let alone create a wholly sectarian purpose out of a textually neutral pronouncement.

Besides being unnecessary, use of the title to inform the plain meaning of the policy's language is improper. Indeed

even if we were examining the title of a statute or legislative codification - - and we are doing far less than that here - - the Supreme Court has warned that "the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947). The Eleventh Circuit and its predecessor court have repeatedly employed this principle of statutory construction when interpreting the statutory text. See, e.g., North Ala. Express, Inc. v. Interstate Commerce Comm'n, 971 F.2d 661, 664 (11th Cir. 1992) ("Section and chapter titles cannot alter the plain meaning of a statute; they can only assist in ambiguity."); Scarborough v. Office of Personnel Management, 723 F.2d 801, 817 (11th Cir. 1984) ("[R]eliance upon heading to determine the meaning of a statute is not a favored method of statutory construction."); Rich v. Commissioner of Internal Revenue Serv., 250 F.2d 170,175 (5th Cir. 1957) ("[T]he plain and unambiguous meaning of the text of the section cannot be extended by its title or heading.").

Finally, the majority opinion points to post-enactment comments of some members of the School Board made at a June 1, 1993 meeting as evidence of the School Board's wholly sectarian purpose to "permit" graduating students to pray. However, the district court observed that "[t]he motivation or intent of the Board relative to the Reynolds

Memorandum of May 5 is essentially unknown." Adler I, 851 F. Supp. at 452. No debate was had and as far as the record reflects, no vote was taken on the Reynolds Memorandum. The June 1st comments were made almost a month after the policy was promulgated and distributed, in the context of a proposal to replace student-initiated messages with a moment of silence. The motion failed, and the policy was left in force. The most one could say is that the statement of one Board member at the June 1st meeting could be characterized as advocating direct school involvement with religion at graduation ceremonies.[5]

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[5]The majority opinion offers four post-enactment statements of School Board members to show that the School Board intended to permit graduating students to engage in prayer. In fact, the statements to which the majority refers generally buttress the conclusion that the School Board's policy was not a sham. Of those four statements, only the statement of Board member Bill Parker can be characterized as advocating direct school involvement with religion at graduation ceremonies. See Tr. of Duval County Sch. Bd. Meeting at 2 ("I think that our school principals should be allowed to work out a non-sectarian message with our student chaplains, or a guest minister, rabbi or whatever that would be acceptable to all at this very important time in our young people's lives."). The statements of Don Buckley and Nancy Corwin, while generally supportive of religion, acknowledge that an intended effect of the policy is to insulate the content of messages from school influence. See id. at 5 (Buckley) ("I think the only way we can keep ourselves clear on this thing is to keep ourselves out of what happens in this area of the graduation ceremony."); (Corwin) ("I also believe that the democratic process in which seniors were given the ability to choose which form of inspirational message, if any, they wanted at their commencement was an appropriate one and I'm going to stand by it."). Rather than betraying an illegitimate intent to ensure that prayer take place at graduation ceremonies, these statements indicate that Buckley and Corwin perceived the School Board policy as disassociating the school hierarchy from student messages. The fourth statement referenced by the court, that of Board member Stan Jordan, was also

Simply put, the post-enactment comments are not sufficient to transform the policy's express secular purpose into a preeminently religious purpose.

More importantly, regardless of how these post hoc statements are interpreted, they cannot be construed to override the policy's language articulating a clear secular purpose. See Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464,1472 (11th Cir. 1997). Indeed in Bown, this Circuit had occasion to find that the legislative history of a Georgia statute (mandating a period for quiet reflection in public schools), which contained some expressions of religious motives for voting for the Act, could not "override the express statutory language articulating a dear secular purpose." Id.[6]

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supportive of the policy. See id. at 8 ("I plan to vote for the administration plan and against the proposal that's on the table."). Taken as a whole these utterances by School Board members constitute recognition that the old regime of state-directed school prayer in Duval County had passed and been replaced by a new regime over which they had far less control.

[6]The majority opinion's reliance on Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989), as controlling or at least informing the secular purpose inquiry in this case is misplaced. It cites Jager for the proposition that when a policy's "actual purpose" is religious, or "intrinsically religious," id. at 830, it cannot meet the secular purpose prong of Lemon. But Jager does no more than state the obvious, that in order to meet Lemon's first prong, a government policy must have a genuine secular purpose and not be a sham. See Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987). If a policy's "actual purpose" is wholly religious then Lemon's secular purpose requirement is not satisfied. In Jager, we held that a school district's practice of having representatives of

In sum, whether standing alone or in concert, the three pieces of evidence cited by the majority cannot strip the policy of a secular purpose. No matter what an individual board member may have hoped - - and they said nothing on the record about codifying this policy - - Duval County's policy is facially neutral and undeniably evinces a secular purpose. That is enough to pass constitutional muster under Lemon.

B.

As for whether the policy has the primary effect of advancing religion, I do not see how a policy that on its face strips the School Board of any authority over the central decisions - - who speaks, whether there will be a speaker, or what the content of the speech may be - - can have the primary effect of advancing religion in any way. See Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 835 (9th Cir. 1998), withdrawn & rehg en banc granted, 165 F.3d 1265 (9th Cir. 1999). As the district court found, the implementation of the policy may result in no prayer at all. Adler I, 851 F. Supp. at 454. Indeed, in order to ensure that no one perceives any student's religious utterance as being the state's prayer, the policy explicitly divorces any student message from School Board sponsorship.

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student organizations deliver invocations prior to football games had as its "preeminent purpose" the endorsement of Protestant Christianity. 862 F.2d at 830. The only discretion left to the students was the selection of who would pray.

The Duval County School Board policy does not guarantee that a prayer will be uttered or that religion will be aided; any such result is wholly dependent on a private actor making an autonomous decision to deliver a prayerful message. The Supreme Court has repeatedly upheld facially neutral programs that may permit an individual to support religion. See, e.g., Agostini v. Felton, 521 U.S. 203, 223-232 (1997) (upholding New York program of sending public school teachers into parochial schools to provide remedial education where aid was made available to religious and secular beneficiaries on a nondiscriminatory basis); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-12 (1993) (sustaining section of Individual with Disabilities Act providing disabled children with aid regardless of whether a child attends a sectarian institution); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487-89 (1986) (holding that Establishment Clause not violated when the state paid a blind student's tuition at a Christian college through a generally-applicable aid program, and observing that aid reach a religious institutions "only as a result of the genuinely independent and private choices of aid recipients"); Mueller v. Allen, 463 U.S. 388, 397-99 (1983) (upholding a state tax deduction for specified educational expenses, and characterizing any such aid to religion as being "only as a result of numerous private choices of individual parents of school-age children").

C.

For many of the same reasons, I would find that the School Board's policy does not excessively entangle the Board with religion in violation of the third part of the Lemon test. The policy remains facially neutral with respect to religion, requiring only that graduation messages be voted on by students, and composed and directed by a student speaker. By its very terms, the policy explicitly prohibits any review of the student message at all. Undoubtedly, the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality. See Board of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (plurality opinion); Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981); Chabad-Lubavitch v. Miller, 5 F.3d 1383,1389 (11th Cir. 1993) (en banc); Jager v. Douglas County Sch. Dist., 862 F.2d 824,831 (11th Cir. 1989).

While the majority today holds only that the Duval County School Board's policy is facially unconstitutional, implicit in its rationale is the need for school censorship if schools are to allow students the opportunity to speak at graduation at all. At the core of the court's holding is "the state's control over nearly all aspects of the graduation ceremony." But the degree of control that schools generally exert over high school graduation ceremonies is unlikely to because graduation ceremonies are, by their nature, highly choreographed. The majority opinion therefore leaves school officials with only two choices: either eliminate student speech altogether or retain student speech, subject to

censorship by school authorities. If school officials choose the latter course, they will be left with the unenviable task of identifying the religious content in student speeches for excision;[7] if, however, they choose the former, they will have deprived the graduation class of any role in shaping its high school graduation and they will have banned all private student expression. For me, the Establishment Clause requires no such Hobson's choice. What it does require is a recognition of the critical difference between a private statement of religious values and a religious utterance endorsed by the state. The Duval County School Board's policy has done no more than that I would, therefore, affirm the judgment of the district court.

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[7]There is no easy or precise guideline for school officials to follow when excising student speech of religious content. The constitutional definition of religion is expansive; it encompasses "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinated or upon which all else is ultimately dependent" and "which occupies in the life of its possessor a place parallel to that filled by [] God." United States v. Seeger, 380 U.S. 163,176 (1965). Moreover the belief "need not be acceptable logical, consistent, or comprehensible to others." Thomas v. Review Bd., 450 U.S. 707, 714 (1981). Indeed, if the School Board's censorship is not "rigorous" enough and thereby allows religion to creep into graduation ceremonies, a policy of allowing monitored student speech may still be subject to constitutional attack

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EMILY ADLER, etc., et al.,

Plaintiffs

-vs- Case No. 98-460-CIV-J-10C

THE DUVAL COUNTY SCHOOL BOARD and THE DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants.
_____/

ORDER DENYING APPLICATION FOR PRELIMINARY INJUNCTION, ADVANCING THE CAUSE ON ITS MERITS, AND DIRECTING THE ENTRY OF JUDGMENT

In this action the Plaintiffs seek the entry of a preliminary injunction prohibiting the Defendants "from sponsoring and conducting religious exercises during high school graduation ceremonies throughout the Duval Public School District..." (Verified Complaint, Doc. 1, p.1). A hearing on the motion was conducted today in open Court. For the reasons that follow, the Court had decided that the application for a preliminary injunction should be denied, that the case on its merits should be advanced and consolidated with the hearing for application of preliminary injunctive relief pursuant to Rule 65(a)(2) of the Federal

Rules of Civil Procedure, and that Final Judgment should be entered in favor of the Defendants.[1]

This is, for all practical purposes, the second time this case has appeared before this Court. In 1994 a similar group of Plaintiffs represented by the same counsel sought the same injunctive relief with respect to high school graduation or commencement ceremonies then scheduled to be conducted in the spring of that year. I decided at that time that the Plaintiffs' constitutional rights were not infringed. Adler v. Duval County School Board, 851 F. Supp. 446 (M.D. Fla. 1994), appeal dismissed as moot, 112 F.3d 1475 (11th Cir. 1997). This action presents precisely the same claims predicated upon the same constitutional theories or contentions; and, at today's hearing, counsel stipulated that the operative facts remain unchanged.[2] The only factual difference is that a new series of graduation ceremonies is scheduled for 1998. The present case was filed for the purpose of relitigating the issue based upon the contention of Plaintiffs' counsel that the law has now evolved in their favor as manifested by the intervening decisions in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996), en banc; Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994),

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[1]A separate Order has been entered disposing of other pending motions.

[2]The Plaintiffs have filed a separate motion for the Court to take judicial notice of the entire file in the earlier proceedings (Adler I).

vacated as moot, 115 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995); and Chandler v. James, 958 F.Supp. 1150 (M.D. Ala. 1997).

Both Harris and Chandler are clearly distinguishable from this case. Both involved policies designed to permit religious prayer during public school graduation ceremonies. As I previously determined in this case however, the challenged policy of the School Board had a primary secular purpose. See Adler I, 851 F.Supp. at 451-452. The decision of the Third Circuit in Black Horse Pike is more closely in point, but turned in large measure upon the Court's determination that high school graduation ceremonies are not limited public fora within the meaning of the Supreme Court jurisprudence under the free speech clause of the First Amendment. But see Brody v. Spang, 957 F.2d 1108 (3d. Cir. 1992), an earlier decision of the Third Circuit upon which I relied in Adler 1, 851 F.Supp. at 454. See also the dissent in Black Horse Pike, 84 F.3d at 1491, n.4.

I have concluded, therefore, that the proper decision in this case is dictated by the decision I reached in Adler I, and that the application for preliminary injunctive relief should be denied now as it was then. Furthermore, as counsel agreed during today's hearing, there is no just reason in fact or law as to why the action should not be advanced on is merits and consolidated with the hearing of the instant application so that final judgment may be entered and the controversy may proceed to the Court of Appeals.

Accordingly, it is ORDERED and ADJUDGED:

1. That Plaintiffs' application for a preliminary injunction is in all respects DENIED.

2. The trial of the action on the merits is advanced and consolidated with the hearing of the application for a preliminary injunction pursuant to Rule 65(a)(2), Federal Rules of Civil Procedure, and the Clerk is directed to enter final judgment in favor of the Defendants against the Plaintiffs with costs to be assessed according to law.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of May, 1998.

/s/ W. Terrell Hodges
UNITED STATES DISTRICT JUDGE

c: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

KAREN ADLER, etc., et al.,

Plaintiffs,

-vs- Case No. 93-833 Civ-J-10

THE DUVAL COUNTY SCHOOL
et al.,

Defendants,

and

SHARON GREEN, etc., et al.,

Defendants-Intervenors.
_____/

MEMORANDUM OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This is an action brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution in which the Plaintiffs claim that their rights under the Establishment Clause of the First Amendment have been violated by the Defendants. Specifically, the claim is that the Defendant school authorities have adopted a policy that permits prayer at graduation exercises in the public high schools of Duval County, Florida, and that such

policy violates the First Amendment prohibition against the establishment of religion by the state.[1]

The Plaintiffs constitute a group of graduating seniors and a parent of a graduating senior who brought this action in early June, 1993, to enjoin the Duval County Public School District from permitting religious invocations and benedictions at the 1993 public high school graduation ceremonies. The Plaintiffs also sought declaratory relief and damages. Another group of students was granted leave to intervene as Defendants, opposing the Plaintiffs' claims and asserting their own First Amendment right of free speech at graduation ceremonies.

On June 4,1993, after a hearing in open court, I orally denied the Plaintiffs' motion for preliminary injunctive relief, finding that the Plaintiffs' had failed to sustain their burden of demonstrating a substantial likelihood of success on the merits (Doc. 18).[2] A renewed motion for injunctive relief was also denied by written order entered the following week (Doc. 32), and the 1993 graduation ceremonies at the seventeen high schools within the Duval County school district were conducted under the School Board's policy

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[1]There is no dispute that jurisdiction exists under 28 U.S.C. § 1343(a)(3), or that the Defendants acted, and are acting, under color of state law within the meaning of that statute and 42 U.S.C. § 1983.

[2]This decision was made largely on the authority of Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993), a recently decided case on closely analogous facts favoring the position of the Defendants.

which is the subject of the constitutional challenge made in this litigation. The case then proceeded through the discovery stage and is presently before the Court on the parties' cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Upon due consideration, I have determined that there is no genuine issue of material fact, that the case can be decided on the existing record as a matter of law pursuant to Rule 56, and that the Defendants are entitled to prevail on the constitutional issues presented.[3] It follows, for the reasons explained below, that the plaintiffs' motion for summary judgment will be denied, the Defendants' motion and that of the Intervenors will be granted, and final judgment will be entered accordingly.

BACKGROUND

Shortly after the Duval County high school graduation ceremonies in early summer, 1992, the Supreme Court of the United States decided Lee v. Weisman, ___U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), holding that the Establishment Clause of the First Amendment is violated whenever school

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[3]A pretrial conference was conducted on the record on April 18, 1994. All counsel agreed that there is no genuine issue of material fact. The only possible exception relates to the intention, motivation or purpose of the Defendants in pursuing the disputed policy. For the reasons stated later in the text, however, I have determined that this potential fact issue is not material; or, even if it was material, if one accepts the Plaintiffs' factual assertions on the point it would not change the result

officials, as state actors, plan for and arrange the making of religious albeit "nonsectarian" prayer in the form of invocations and benedictions at high school graduation exercises. In response to that decision, Vicki R. Reynolds, the Duval County School Board's legal liaison, at the direction of Larry Zenke, Superintendent of Schools for the Duval County public schools, wrote a memorandum to all school principals in the county saying that "due to the recent Supreme Court Ruling in Lee v. Weisman, there should be no prayer, benediction, or invocation at any graduation ceremonies." Deposition of Larry Zenke, at 7-8 and at Exhibit 1. Thereafter, Superintendent Zenke received a number of letters suggesting that student-initiated and student-led prayer might be constitutional. Deposition of Larry Zenke, at 8-9. Accordingly, he directed Ms. Reynolds to further research the issue. Id. She later advised Superintendent Zenke that it would be appropriate for principals to allow student-initiated and student-led prayer during the graduation ceremony so long as the administration and faculty were not involved in the decision making process. Id. at 10-11. Accordingly, and again pursuant to Superintendent Zenke's direction, Ms. Reynolds issued to all high school principals another memorandum dated May 5, 1993, entitled "Graduation Prayers" stating:

> You will recall that after the 1992 Supreme Court case of Lee v. Wiseman [sic], you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you

have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit Opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or closing message by a student.

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman [sic] decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board [sic], its officers or employees;

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

Deposition of Larry Zenke, at Exhibit 3.

At a subsequent School Board meeting held on June 1, 1993, a motion was made to substitute a "moment of silence" for any student initiated messages that might otherwise be given pursuant to the guidelines or policy announced in Ms. Reynolds' memorandum of May 5. That motion failed by a vote of four to three; and, thus, while the Reynolds' memorandum of May 5 was not itself the subject of any specific vote by the Board, that memorandum was left in force with the acquiescence or tacit approval of the Board as its' official policy governing the 1993 commencement exercises. Moreover, it remains in effect and, unless altered by Defendants or enjoined by this Court, will govern the approaching ceremonies in 1994 as well.

With respect to the 1993 ceremonies conducted after this Court declined to enjoin implementation of the May 5 memorandum, the high school principals, in accordance with the guidelines established the memorandum, delegated decision making authority to graduating senior students at each school respectively, to determine whether student messages should be given at the opening and/or closing of the graduation exercises.[4] At ten of the seventeen high schools, it is undisputed that the students opted for messages that constituted various forms of religious prayer. At the remaining seven schools, however, it appears that either no messages were given at all, or that any that were given were entirely secular, having no religious aspects.

THE PARTIES' CONTENTIONS

Plaintiffs move for summary judgment and argue that prayer during public school graduation ceremonies is per se unconstitutional regardless of the manner in which the decision to have prayer is made and how or by whom

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[4]At some of the schools, the decision was delegated to one or more of the senior class officers, or to a group of students who were in charge of the graduation ceremony. See Depositions of Dr. Dalton Epting, Principal, Mandarin High School, Doc. 95, at 17-19; Earlene T. Lockett, Principal, Ribault Senior High School, Doc. 100, at 11; James H. Jaxon, Principal, Terry Parker High School, Doc. 97 at 14; Ronell Poppel Principal, Ed White High School, Doc. 102, at 18-20; David E. White, Principal, Wolfson High School, Doc. 105, at 27-28. At other schools, the entire senior class student body was involved in the decision making process. See Depositions of Steve Hite Principal, Englewood High School, Doc. 96, at 18-20; Jimmy Johnson, Principal William Raines High School, Doc. 98, at 8; Dr. Larry Paulk, Principal Fletcher High School, Doc. 101, at 19; William L. Stone, Principal, First Coast High School, Doc. 104, at 16.

the prayer is presented. Plaintiffs argue that the primary purpose of the guidelines in the Reynolds' memorandum of May 5 was to advance religion. Plaintiffs also argue that delegating to the students the decision whether prayers are to be included in graduation exercises does not insulate Defendants from being "excessively entangled" with the religious aspect of the graduation ceremony.

Defendants also move for summary judgment and argue that the policy guidelines set out in May 5 memorandum had a secular purpose; that any prayers delivered were student-initiated, student-written and student delivered without monitoring or review by school officials; and therefore, the policy as implemented lacked the pervasive government involvement condemned in Lee and in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Defendants contend that the purpose of the guidelines was to provide direction to school principals concerning graduation messages without advancing or inhibiting religion in any official sense condemned by the Establishment Clause, and that allowing the students to decide whether and what type of speech to have at graduation does not excessively entangle the state with religion. Defendants and the Intervenors further assert the students' constitutionally protected right to freedom of expression at public high school graduations.

DISCUSSION

The First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" applies to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). Pursuant to the Establishment Clause, the government may not aid one religion, and all religions or favor one religion over another. Everson v. Board of Education of Ewing Township, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed.2d 711 (1947). For the last twenty years, the United States Supreme Court has accomplished the often excruciating task of keeping government and religion apart by resorting to the three-pronged test set out in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1970). "First, the statute [or policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Id. at 612-13, 91 S.Ct. 2111-12 (citations omitted). Failure to meet any one of these tests requires that the challenged statute or policy be stricken as violative of the Establishment Clause.

Last term, however, in deciding Lee v. Weisman, 112 S.Ct. 2649 (1992), the Supreme Court did not engage in a Lemon analysis. Rather, the Supreme Court pursued a fact-sensitive "coercion" analysis. Id. at __, 112 S.Ct. at 2660. The Court stated that it need not reconsider Lemon because

of controlling precedents concerning prayer and religious exercise in primary and secondary schools pointing the way to resolution of the case before it without applying the Lemon test. Id. at 112 S.Ct. at 2660. The Court stated that it need not reconsider Lemon because of controlling precedents concerning prayer and religious exercise in primary and secondary schools pointing the way to resolution of the case before it without applying the Lemon test. Id. at 112 S.Ct. at 2655.[5] The Supreme Court's failure to apply Lemon after Lee. See e.g., Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct 2439,124 L.Ed.2d 658 (1993). In Lamb's Chapel v. Center Moriches Union Free School District, however, the Court specifically declared that Lemon "has not been overruled." ___ U.S. ___, ___ n.7,113 S.Ct. 2141, 2148 n.7,124 L.Ed.2d 352 (1993). See also Chabad-Lubavitch of Georgia v. Miller, 5 F.2d 1383, 1388 (11th Cir. 1993) (en banc). Accordingly, it is appropriate to engage in both a Lemon analysis and to apply the "coercion" test of Lee.

A. LEMON APPLICATION

1. Secular Purpose

The Plaintiffs contend that the true purpose of the Reynolds' memorandum of May 5 was to preserve and perpetuate prayer during graduation exercises. They

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[5]The Supreme Court has decided Establishment Clause cases before Lee without relying on the Lemon test. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 679, 104S.Ct. 1255, 1362, 79 L.Ed.2d 604 (1984).

contend that the guidelines set out in the memorandum were prepared and distributed only after pressure was brought to bear upon Superintendent Zenke and Ms. Reynolds to promulgate a policy accommodating prayer. They point especially to a letter to Ms. Reynolds from the pastor of the First Baptist Church stating that he is "'fish'[ing] for ways to incorporate prayer in our graduation ceremonies." March 3, 1993 letter from Calvin J. Carr to Vicky Reynolds, Deposition of Vicky Reynolds, Doc. 103, at Exhibit 1. The Plaintiffs also point to statements made by three of the Defendants as members of the School Board at the meeting held on June 1, 1993, when the possible alternative of a moment of silence was rejected by a vote of the Board.[6]

The Defendants and the Intervenors contend, on the other hand, that the policy or guidelines announced in the May 5 memorandum had a primary secular purpose - - namely, to safeguard the free speech rights of the participating students by permitting them, through a chosen representative of their own, to solemnize the occasion as a culminating vocational experience (unlike periodic athletic events or student assemblies) by having a brief message at the beginning and/or the end of the program acknowledging and drawing attention to the unique, milestone nature of the event.

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[6]See the Second Amended Complaint, Doc. 63, at 7-9, ¶ 19. See also n.7 infra.

It is here that a potential issue of fact enters into the case if, in making an analysis under Lemon, the purpose of the policy is to be determined on the basis of the subjective motivations or intentions of the policy makers rather than the language of the policy itself, the historical setting in which it was conceived, and the manner in which it has been interpreted and applied. In this instance, however, I do not believe that any material fact issue exists.

First, especially where the law or policy under review is the result of an institutional process, such as a vote of a multi-member legislature, council or board rather than action taken by an individual decision maker, the purpose of the disputed law or policy should normally be discerned from the plain meaning of the words used; the official legislative history, if any; the manner in which the law or policy has been interpreted and applied (if such demonstrable experience is available); and, lastly, the general social condition or historical background which led up to the adoption of the law or policy. Barnes v. Glen Theatre, Inc., 501 U.S. 560, ___, 111 S.Ct. 2456, 2461,115 L.Ed.2d 504 (1991); Aldridge v. Williams, 44 U.S. (3 How.) 8, 23, 11 L.Ed. 469 (1845); Church of Scientology v. City of Clearwater, 2 F.3d 1514, 1527 (11th Cir. 1993). The individual and quite possibly varied, purposes or intentions of the several operative decision makers, especially when those views are known only with respect to less than a majority of those voting or deciding, would have little or no probative value.

So, here, to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds) the purpose or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds memorandum of May 5. The discussion pointed to by the Plaintiffs had to do with an alternative proposal - - the "moment of silence" - - and the views that were expressed were those of three of the members, less than a majority. Furthermore, of those three, only one clearly expressed a preference for the retention of prayer as a board sanctioned activity.[7] In the circumstances of this case, therefore, at least as far as the motivation or intent of the Board itself is concerned, I do not believe that there is any material dispute. The motivation or intent of the Board relative to the Reynolds memorandum of May 5 is essentially unknown; or, to the extent that the general views

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[7]Specifically, School Board member Bill Parker stated:

> I cannot vote to allow our '93 graduating class to have a few minutes of silent mediation when we all know that in the past, someone has prayed out loud to thank the Lord for the twelve great and successful years during this period of time. And now we want silence .... I think that our school principals should be allowed to work out a non-sectarian message with our student chaplains, or a guest minister, rabbi, or whatever would be acceptable to all at this very important time in our young people's lives. We need to tell everyone that our free public schools are the cornerstone of this republic and that we want to preserve this country and the things that made it great, that we are all here because of God....

Second Amended Complaint, Doc. 63, at 8, ¶ 19.

of three of the members were disclosed in public debate about a "moment of silence" (rather than the policy in dispute), that evidence is so attenuated as to have no probative value.[8]

Secondly, even if the Court should consider the individual motives or intentions of Superintendent Zenke and Ms. Reynolds, taking the sum of the evidence pointed to by the Plaintiffs together with the inferences to be drawn from that evidence, all in a light most favorable to the Plaintiffs' position in the case, the most that can be said is that Superintendent Zenke and Ms. Reynolds had a mixed motive or purpose: (a) to permit secular "graduation messages" by the students as a solemnization of the ceremony in lieu of the historical invocation and

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[8]Plaintiffs argue that Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989) compels this Court to closely scrutinize the subjective intent of the policy makers and to find, in this case, that the Board members were motivated by a religious purpose. Jager, however, is clearly distinguishable on its facts. Jager involved an Establishment Clause challenge to an "equal access" plan that would allow the giving of invocations prior to public high school football games. Judge Johnson specifically noted that the plan "stated that its purpose was to 'perpetuate and regulate the traditional invocation as part of the opening ceremonies of the school athletic events." Id. at 827. No such statement of purpose is present here. Moreover, the Court doubts the precedential value of Jager in any event, cf. Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479 (11th Cir. 1984), because of the division of opinion among the members of the panel deciding the case. Church of Scientology v. City of Clearwater, supra, is similarly distinguishable on this point because of the nature and volume of the evidence available in that case concerning the motives by the city council in passing the disputed ordinance. See 2 F.3d at 1530-34. Moreover, neither Jager nor Church of Scientology involved countervailing rights of free speech in a limited public forum, a point critical to the correct constitutional resolution of this case as discussed infra.

benedictions led by clergy; (b) to accommodate prayer or religious content in such student driven "graduation messages" if the students, independently of any involvement by school authorities, decided upon that course in the exercise of their own First Amendment right of free speech; or (c) to have neither secular messages of solemnization nor religious prayer if the students preferred that mode. There is, therefore, no material dispute of fact concerning those motives; and, as can now be demonstrated as a matter of law, those motives are predominantly secular in nature for the purpose of the first prong of the Lemon test (requiring a secular governmental objective in enacting the law or policy in dispute).

While this case has been pending, the United States Court of Appeals for the Eleventh Circuit has rendered an important en banc decision concerning the Establishment Clause, the Lemon test, and the interrelationship of the Establishment Clause and the Free Speech Clause of the First Amendment. Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383 (11th Cir. 1993) (en banc). There the court considered the constitutionality of a refusal by the state of Georgia to permit display in the capital rotunda of a Chanukah menorah. The state contended that if it allowed the display it would violate the Establishment Clause, while the plaintiff asserted that no Establishment Clause violation would occur and that it had a First Amendment right of free speech to exhibit the display. The court began unraveling this constitutional puzzle by applying the Lemon test to decide whether the Establishment Clause would be violated if the

state allowed exhibition of the menorah in the capital rotunda. The court held:

> Georgia would not violate the first prong of the [Lemon] test because its neutral treatment of Chabad's display would advance the secular purpose of providing an arena for its citizenry's exercise of the constitutional right toffee speech. See Widmar [v. Vincent], 454 U. S. at 271, 102 S.Ct. at 275 (noting with approval that the district and appellate courts held that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose"); cf. Lynch [v. Donnelly], 465 U.S. at 680, 104 S.Ct. at 132 ("The Court has invalidated legislation on governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.").

5 F.3d at 1389 (emphasis supplied). So, in this case, even though allowance of student-initiated and student-delivered messages may result in the giving of prayer in some graduation exercises, that does not equate with a finding that the policy announced in the Reynolds' memorandum of May 5, was intended to promote religion. On the contrary, it's purpose was secular - - to retain, if the graduating students so desired, the giving of message to solemnize the occasion and to observe and protect the right of free speech of the students giving Such messages. "[A] policy of

treating religious speech the same as all other speech certainly serves a secular purpose." Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1543 (6th Cir. 1992) (en banc).

2. Primary Effect

Plaintiffs next argue that the guidelines in the Reynolds' memorandum of May 5 have the primary effect of an advancement of religious by the State. They contend that allowing any prayer at a school sponsored event controlled by school officials leads to the inescapable conclusion that the school officials endorse and are advancing the establishment of religion in contravention of Lemon's second proscription.

Defendants and intervenors contend, on the other hand, that the guidelines merely provide a mechanism whereby the students have the opportunity to decide whether or not to have a "graduation message" during commencement exercises, which constitute a limited public forum. The guidelines do not mandate, require, or direct that religious expression or prayer occur at any graduation ceremony. Indeed, the students may opt not to have a message at all or they may opt for a purely secular message. Accordingly, defendants argue, the School Board itself has not advanced religion in any way, officially or otherwise.

Determining the primary effect of the guidelines in Reynold's May 5 memorandum is not particularly difficult. While, to be sure, the constitutionality of prayer at

graduation ceremonies is the issue that prompted the issuance of the guidelines, the guidelines themselves are entirely neutral on the subject of prayer. The word is never mentioned, nor is there any inference, subtle or otherwise, that the students should opt for prayer in preference to a secular message or no message at all. Moreover, the neutrality of the guidelines in the understanding of those most affected by them was clearly demonstrated in the results they produced in 1993. While ten of the schools elected to have some form of prayer, as many as seven did not.[9] And finally, even in those schools having prayer, it was necessarily understood by all of the graduating students (even those opposed to it) that the prayer was the voluntary election of the students themselves - - since they voted on the issue - - and was not the result of any governmental policy or decision by the school authorities, i.e., was not the result of any "establishment" activity on the part of the state within the meaning of the First Amendment.

Lemon only condemns government action that has the primary effect of advancing religion. 403 U.S. at 612, 91 S.Ct.

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[9]Invocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies. It is not surprising therefore, that the graduating students at ten of the schools would opt in favor of continuing that practice at their own graduation exercises whether in the interest of tradition or in the interest of religious worship. This is especially true on the first occasion of having the issue decided by student choice. Indeed, if there is any surprise it lies in the student choice. Indeed, if there is any surprise it lies in the election of the other seven schools not to have any prayer, and that result is of no aid to the Plaintiffs since they bear the burden of showing an "establishment" effect flowing from the challenged policy.

at 2111. In summary, the guidelines in Reynolds' May 5 memorandum lack that primary effect in two distinct senses. First, unlike the display of the menorah in Chabad-Lubavitch of Georgia, which would always involve religious connotations, this is a stronger case for the Defendants because implementation of the guidelines may or may not result in prayer at all. There is no suggestion or incentive one way or the other, and the lone occasion on which the guidelines have been applied to date produced divided results. Secondly, even when prayer was given, it was not a result of any creative or authoritarian "establishment" activity on the part of school authorities, and this was necessarily understood by those in attendance. "[T]o have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327,337,107 S.Ct. 2862, 2869, 97 L.Ed.2d 273 (1987). That would not be fair to say in this case.

There is another reason here that the challenged policy would not have the primary effect of advancing religion. It lies in the fact that public high school graduation ceremonies conducted by the Defendants are limited public fora within the meaning of the First Amendment's free speech jurisprudence. See Perry Educ. Ass'n. v. Perry Local Educator's Ass'n, 460 U.S. 37,45-46,103 S.Ct. 948, 954-55,74 L.Ed.2d 794 (1983), and Crowder v. Housing Auth. of City of Atlanta, 990 F.2d 586, 590-91 (11th Cir. 1993). Traditionally, the ceremonies are held at the coliseum, away from the

school campuses, and virtually the entire program is given over to public speech making by the valedictorian and other leaders of the graduating class, and by community leaders who are invited to give the principal commencement address.[10] In this instance, for example, the featured speaker at one of the graduation exercises in 1993 was none other than Chief Judge Gerald Bard Tjoflat of the United States Court of Appeals for the Eleventh Circuit. Deposition of Don Buckley, Doc. 93, at 93, lines 11-13. The speaker at another was the Honorable Tillie Fowler, United States House of Representatives, Fourth District of Florida. Deposition of Dalton Epting, Doc. 95, at Exhibit 2. I have no difficulty concluding, therefore, that the Duval County public school graduation ceremonies are designated, limited public fora. See Brody v. Spang, 957 F.2d 1108, 1120 (3d Cir. 1992). With that decided, Chabad-Lubavitch of Georgia once again governs the outcome:

> The analysis that courts must bring to bear on the interplay between the Free Speech Clause and the Establishment Clause in the public forum context is somewhat curious in that the existence of the public form initially implicates the Free Speech issue and ultimately determines the Establishment Clause issue. Once the states creates a public

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[10]There is no evidence that any speeches given at graduation exercises in Duval County, whether by students or by others, have been subject to routine prior review or approval as to content; and, of course, the policy announced in the memorandum of May 5 expressly excludes such a requirement with respect to the brief opening or closing messages in lieu of the previous invocation or benediction.

forum, it may only exclude a private party's religious speech within the forum - - a content-based restriction on speech - - if the exclusion survives strict scrutiny review, that is, if the restriction is narrowly tailored to serve a compelling state interest.

In those public fora cases, the state - - as it as here - - will interpose as a compelling state interest the need to avoid a violation of the Establishment Clause and will argue that permitting the religious speech may send a constitutionally impermissible message of state endorsement. This might be true if the private party communicated the religious speech on government property that was not a true public forum. Precisely because the religious speech is communicated in a true public forum, however, the state, by definition, neither endorses nor approves of the speech.

. . .

Any perceived endorsement of religion in a true public forum is simply misperception; the Establishment Clause is not, in fact, violated. Doe [v. Small], 964 F.2d [611, 629 (7th Cir. 1992)] (Easterbrook, J., concurring) ("[R]eligious speech may not be excluded for public forums just because passersby misunderstand the public role.".

. . .

> Giving full effect to the public forum doctrine does not elevate the Free Speech Clause above the Establishment Clause. The central Establishment Clause inquiry - whether Georgia endorses Judaism by permitting Chabad to display its menorah in the Rotunda - - is resolved by reference to the Rotunda's status as a public forum. Because the Rotunda is a public forum, in which the speech of private parties does not enjoy the State's imprimatur, there is no Establishment Clause violation in the first instance to weigh against Chabad's rights under the Free Speech Clause. Courts have found otherwise ... simply misunderstood the principles they sought to apply,

5 F.2d at 1939-94 and n.17 (citations omitted).

3. Excessive Entanglement

Finally, Plaintiffs argue that because the public high school graduation exercises are sponsored by the School Board and held at government owned facilities controlled by Defendants, allowing graduation prayer at graduation ceremonies results inevitably in excessive entanglement of the public schools with religion in violation of Lemon's third prong.

The United States Supreme Court has only held state action unconstitutional where it has found excessive entanglement of governmental and religious institutions. "The entanglement prong of the Lemon test is properly limited to institutional entanglement." Lynch, 465 U.S. at 689, 104 S.Ct at 1368 (O'Connor, J., concurring). By requiring that graduation exercises be voted on by the students, and written and presented by a student volunteer, the guidelines effectively exclude institutional entanglement. Plaintiffs would have the Court find an excessive entanglement in this case because the graduation ceremonies are "closely school-controlled." For such supervision and control to be constitutionally significant, however, it must involve the challenged activity. That is, Plaintiffs must demonstrate some entanglement between the school and the prayer. There is none. Even in Jones v. Clear Creek Independent School District,[11] 977 F.2d 963 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993), a case with analogous facts, the court did not find an excessive entanglement where the policy required review of the

---

[11]In an earlier decision, and prior to the United States Supreme Court's ruling in Lee v. Weisman, the Fifth Circuit Court of Appeals applied the Lemon test and held that a Texas school district's resolution permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies did not violate the Establishment Clause. Jones v. Clear Creek, 930 F.2d 416 (5th Cir. 1991) (Jones I). Following appeal, the Supreme Court granted certiorari, vacated the Fifth Circuit's judgment in Jones I, and remanded it for further consideration in light of Lee. Jones v. Clear Creek Indep. Sch. Dist., 505 U.S. 12 S.Ct. 3020, 120 L.Ed.2d 892 (1992). The opinion afer remand is the one referred to in this order. Jones v. Clear Creek Independent School District, 97 F.2d 963 (5th Cir. 1992), cert. denied, ___ U.S. ___ 113 S.Ct 2950, 124 L.Ed.2d 697 (1993).

message by a faculty member. In this case, the students were given carte blanche to determine the content of the message and no review was required thereby relieving the institution of an "excessive entanglement." See also Chabad-Lubavitch of Georgia, 5 F.3d at 1389.

Accordingly, because the guidelines in Reynolds' May 5 memorandum have a predominantly secular purpose, do not have the primary effect of advancing or endorsing religion, and do not excessively entangle the schools and the School Board with religion, I find no violation of the Establishment Clause under Lemon.

B. LEE APPLICATION

In Lee v. Weisman, the Supreme Court held that Robert E. Lee, a public school principal acting in accord with the policy of his school district, violated the Establishment Clause by inviting a member of the local clergy, Rabbi Leslie Gutterman, to deliver a nonsectarian, nonproselytizing invocation at his school's graduation ceremony. Instead of directly considering any of the Lemon prongs in invalidating the school district's policy in Lee, the Court analyzed the coercive effect of the principal's actions. That is, the Court determined that the principal coerced graduation attendees to join in a formal religious exercise. 505 U.S. at _, 112 S.Ct. at 2655. In reaching its conclusion, the Court emphasized that the inquiry was a "delicate and fact-sensitive one." Id., at ___112 S.Ct at 2661.

The facts that the Court found particularly troubling in Lee were summarized as follows:

> State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory....

Id. at ___, 115 S.Ct. at 2665. Thus, Lee identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. Applying this analysis to the facts in this case does not change the outcome as dictated by Lemon.

Here, the school principals exercise significantly less control than was found in Lee. In Lee the principal specifically decided that an invocation and a benediction should be given, and he decided that a particular religious leader would give it. The guidelines here, by contrast, do not solicit or mandate invocations or benedictions; they simply permit them if the students desire. Neither the principals nor the faculty have any avenue of reviewing the messages once composed, and the guidelines explicitly preclude anyone but a student volunteer from delivering the graduation message. Finally, and most significantly in terms of coercive effect, the participants clearly understand

that the student messages are just that - - student messages that are divorced entirely from any governmental or institutional sponsorship. This Court agrees with the Fifth Circuit's analysis in Jones that "the graduation prayers permitted by the [guidelines] place less psychological pressure on students than the prayers at issue in Lee because all students ... are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." 977 F.3d at 971.

Plaintiffs argue that allowing any type of prayer at graduation places an unconstitutionally impermissible amount of psychological participation in the state-sponsored religious activity are in a fair and real sense obligatory .... Id. at ___, 115 S.Ct. at 2665. Thus, Lee identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. Applying this analysis to the facts in this case does not change the outcome as dictated by Lemon.

Here, the school principals exercise significantly less control than was found in Lee. In Lee the principal specifically decided that an invocation and a benediction should be given, and he decided that a particular religious leader would give it. The guidelines here, by contrast do not solicit or mandate invocations or benedictions; they simply permit them if the students desire. Neither the principals nor the faculty have any avenue of reviewing the messages once composed, and the guidelines explicitly preclude

anyone but a student volunteer from delivering the graduation message. Finally, and most significantly in terms of coercive effect, the participants clearly understand that the student messages are just that -- student messages that are divorced entirely from any governmental or institutional sponsorship. This Court agrees with the Fifth Circuit's analysis in Jones that "the graduation prayers permitted by the [guidelines] place less psychological pressure on students than the prayers at issue in Lee because all students ... are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." 977 F.2d at 971.

Plaintiffs argue that allowing any type of prayer at graduation places an unconstitutionally impermissible amount of psychological pressure upon students to participate in religious exercises. To so hold, however, would constitute an unwarranted extension of Lee. The Court had the opportunity in Lee to ban all prayer at graduation ceremonies. Rather than focus upon and, indeed, emphasize the need for fact sensitivity, the Court could have stated that any prayer at public high school graduation ceremonies violates the Constitution under any circumstances. It did not do so. Or, the Court could have required that separate baccalaureate services be held in lieu of including invocations and/or benedictions in official graduation ceremonies. Again, the court declined to so hold.

In light of the dictates of both Lemon and Lee, the Court finds that the Defendants' policy as announced in the Reynolds' memorandum of May 5, 1993 does not violate the Establishment Clause of the United States Constitution.

Accordingly, upon due consideration, Defendants' motion (Doc. 87) and Intervenors' motion (Doc. 85) for summary judgment are GRANTED and Plaintiffs' motion (Doc. 90) for summary judgment is DENIED. The Clerk is directed to enter judgment in favor of Defendants and Intervenors and against Plaintiffs.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 4th day of May, 1994.

/s/ W. Terrell Hodges
United States District Judge

Copy to counsel of record

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jun 3 1999
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-2709

D. C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

No. 98-2720

D.C. Docket No. 98-460-CIV-J-10C

EMILY ADLER, individually; on behalf of herself and all persons similarly situated, SETH FINCK, individually; on behalf of himself and all persons similarly situated, et al.,

Plaintiffs-Appellees,

versus

SUSAN BOLES, as parent & next friend of Rebecca Boles, a minor child and on behalf of all public school students within the Duval County Public School District,

Movants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(Opinion May 11, 1999, 11th Cir., 1999, ___F.3d ___)

(June 3, 1999)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, HULL and MARCUS, Circuit Judges*.

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* Senior U.S. Circuit Jude Phyllis A. Kravitch has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

BY THE COURT:

A member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED, that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 17 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-2709-JJ AND 2720-JJ

EMILY ADLER, individually; on behalf
of herself and all persons similarly situated,
SETH FINCK, individually; on behalf of
himself and all persons similarly situated, et al.,

Plaintiffs-Appellants,

versus

DUVAL COUNTY SCHOOL BOARD,
DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, CARNES, BARKETT, HULL, MARCUS, WILSON, Circuit Judges*, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

ORD-41

*Judge Susan H. Black did not participate in this decision.

SUMMARY OF CERTAIN EXHIBITS TO MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

School	Year	Description/Speaker
Douglas Anderson	1994	Invocation/Senior Class President
Exhibits 1,2,3		Benediction/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
Baldwin	1994	Benediction/Senior Class President
Exhibits 4,5,6,7	1995	Benediction/Senior Class Secretary
	1996	Benediction/Senior Class President
	1997	Benediction/Valedictorian
Englewood	1994	Invocation/?
Exhibits 8,9,10	1996	Invocation/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain

School	Year	Description/Speaker
First Coast	1994	Inspiration/Senior Class Chaplain
Exhibits 11,12,13,14		Farewell/Senior Class Chaplain
	1995	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain
	1996	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain
	1997	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain
Fletcher	1994	Senior Reflections/Senior Class Chaplain
Exhibits 16,17,18,19	1995	Senior Reflections/Senior Class Chaplain
	1996	Senior Reflections/Senior Class Chaplain
	1997	Senior Reflections/Senior Class Chaplain
Jackson	1994	Senior Reflections/Senior Class Chaplain
Exhibits 20,21	1995	Senior Reflections/Student
Lee	1994	Invocation/?
Exhibits 22,23,24		Senior Reflections/Senior Class Chaplain
	1995	Senior Reflections/Senior Class Chaplain
	1997	Senior Reflections/Senior Class Chaplain

School	Year	Description/Speaker
Parker	1994	Invocation/Senior Class Chaplain
Exhibits 25,26,27,28	1995	Invocation/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
Paxon	1994	Occasion/Senior Class Chaplain
Exhibit 29		
Raines	1994	Invocation/Salutatorian
Exhibits 30,31,32,33		Benediction/Clergy
	1995	Invocation/Faculty Department Chair (in Exhibit 31)
	?1995?	Invocation/Salutatorian (in Exhibit 31)
		Benediction/?
	1996	Invocation/Senior Class Chaplain
		Benediction/?
	1997	Invocation/Sean Webb
		Benediction/?

School	Year	Description/Speaker
Ribault	1995	Opening Message/Senior Class Chaplain
Exhibits 34,35,36	1996	Opening Message/Senior Class Chaplain
	1997	Opening Message/Senior Class Chaplain
Sandalwood	1994	Invocation/Student
Exhibits 37,38,39,40	1995	Invocation/Senior Class Chaplain
	1996	Invocation/Student
	1997	Invocation/Student
Stanton	1994	Inspirational Message/Student
Exhibits 41,42	1996	Inspirational Message/Student
White	1995	Invocation/Senior Class Chaplain
Exhibits 43,44,45		Benediction/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
		Benediction/Student Council Chaplain

School	Year	Description/Speaker
Wolfson	1996	Benediction/Chaplain
Exhibit 52		
?	?	Opening Message/?
Exhibit 58		

MEMORANDUM

TO: All High School Principles

FROM: Vicki R. Reynolds
Liaison for Legal Affairs

RE: GRADUATION PRAYERS

DATE: May 5, 1993

You will recall that after the 1992 Supreme Court case of Lee v. Wiseman, you received a memorandum from me instructing that because of the decision, we would no longer be able to have prayers at graduation ceremonies. Most of you have recently been bombarded with information, as have I, regarding whether or not student initiated and led prayers are acceptable based upon a recent Fifth Circuit opinion. The purpose of this memorandum is to give you some guidelines on this issue if the graduating students at your school desire to have some type of brief opening and/or closing message by a student.

This area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take. The key to the Lee v. Wiseman decision was that the prayer given at that graduation ceremony was directed and initiated by the school system, which made it unconstitutional, rather than by permissive student choice and initiative. With that premise in mind, the following guidelines may be of some assistance:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

Please feel free to contact me at 390-2111 should you have any questions about this topic.

VRR

cc: Larry Zenke
Frances Powell
Jim Ragans

No. 01-287

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

v.

DUVAL COUNTY SCHOOL BOARD and THE DUVAL COUNTY PUBLIC SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DUVAL COUNTY SCHOOL BOARD AND SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Does the Duval County School Board's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies facially violate the Establishment Clause?

2. Should the petition for writ of certiorari to the Eleventh Circuit Court of Appeals to review the reaffirmed and reinstated *en banc* decision upholding the policy be granted?

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   a. Unlike the Duval County policy, the *Santa Fe* Policy would inevitably result in prayer and the exclusion of minority views. 16

   b. Unlike the Duval County Policy, the subject of the *Santa Fe* vote was improper. 16

   c. Unlike the Duval County Policy, the alleged secular purposes under the *Santa Fe* Policy were a sham. 18

   d. Unlike the Duval County Policy, there was extensive governmental involvement under the *Santa Fe* policy which caused the resulting student speech not to be private speech, but rather attributable to the government. 19

   e. Unlike the Duval County Policy, the *Santa Fe* Policy endorsed and encouraged prayer. 22

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Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) ..... *passim*

Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) 26

United States Constitution:

First Amendment 1, 26

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' quotation of the First Amendment provisions implicated in this appeal is unduly restrictive. The relevant language of the First Amendment is as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

RESPONDENTS' POLICY PROVISIONS

The operative provisions of Duval County School Board's policy at issue in this case read as follows:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The Policy states the purpose of the above provisions is as follows:

> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

STATEMENT OF THE CASE AND FACTS

This case presents a facial Establishment Clause challenge to a Duval County School Board policy allowing graduating seniors to have one of their members make brief remarks on any subject of the student's choosing near the beginning or end of their graduation ceremonies, and prohibiting school officials from intervening or interfering with the speaker's remarks. Regrettably, the petition for writ of certiorari uses incomplete and misleading quotations, mischaracterizes the evidence in the record, and misstates the nature of the Duval County School Board's arguments below in an effort to have this Court review the *en banc* decision of the Eleventh Circuit Court of Appeals in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) ("*Adler V*").

In *Adler V*, the Eleventh Circuit held that the Duval County School Board's Policy ("Duval County Policy" or "Policy") of permitting a graduating high school student, elected by her class, to deliver a brief unrestricted message of her choice at the beginning and/or the closing of graduation ceremonies does not facially violate the Establishment Clause. In so holding, the Eleventh Circuit carefully examined this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) ("*Santa Fe*") and correctly applied the law provided by this Court to the facts in this cause.

The substantive guidelines in the Duval County Policy[1] under review, quoted above, are not content driven. They allow

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1. The Policy is contained in a May 5, 1993, memorandum to high school principals from Ms. Vicki Reynolds, Liaison for Legal Affairs for the Duval County School Board, which the Board adopted by acquiescence or tacit approval. *Adler v. Duval County School Board*, 851 F. Supp. 446, 449 (M.D. Fla. 1994) ("*Adler I*"). Petitioners' Appendix inadvertently indicates that the Policy was addressed to all high school

(Cont'd)

use of brief opening and/or closing remarks, not to exceed two minutes, at high school graduations within the discretion of the graduating senior class to be given by a student volunteer chosen by the graduating senior class as a whole. If the graduating senior class chooses to have a message, the content of that message is prepared by the student volunteer and cannot be monitored or otherwise reviewed by the Duval County School Board, its officers or employees. The Policy states the purpose of the guidelines is to allow students to direct their own graduation messages without monitoring or review by school officials.[2]

(Cont'd)
"Principles." *See* App., p. 267a. The Policy memorandum is captioned "Re: Graduation Prayers" which the Eleventh Circuit stated

> merely introduces the topic of debate within Duval County in the aftermath of *Lee* rather than suggesting, let alone compelling, the outcome of that debate. The title affixed to the Reynolds Memorandum does no more than alert the reader to the general subject matter of the text; and it remains the language and substance of the policy, rather than its title, that is controlling.

Adler v. Duval County School Board, 206 F.3d at 1070, 1087 (11th Cir. 2000) ("*Adler IV*").

2. This is in contrast with the "purpose" or reason noted in the introductory portion of the Policy as to why Ms. Reynolds was addressing the issue at that time in the first place. Compare Petition, p.3. Threats from advocates and opponents of student religious speech surrounded the 1993 graduation season. The Policy notes on its face: "[T]his area of the law is far from clear at this time, and we have been threatened by lawsuits from both sides on the issue depending on what action we take." *Adler IV*, 206 F.3d at 1072.

Board Chairman Donald Buckley voiced the clear concern that the Board remove itself from the decision making process completely during Board debate a month later on a moment of silence proposal which was rejected: "I think the only way we can keep ourselves clear on this thing

(Cont'd)

On July 22, 1992, following this Court's decision in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) ("Lee"), Vicki Reynolds, Liaison for Legal Affairs for the Duval County School Board, revised existing policy and practices by sending a memo to all Duval County school

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(Cont'd)
is to keep ourselves out of what happens in this area of the graduation ceremony." *Adler IV*, 206 F.3d at 1088 n.8. This is the same debate at which another Board member spoke as quoted in the Petition at p.4. Neither remark reflects the Board's collective intentions as to the Policy which is in issue here, which was promulgated by Ms. Reynolds earlier, and which never came before the Board for debate or for a vote. The Eleventh Circuit in *Adler V* addresses this point specifically as follows:

> We also noted that the text of the policy did not reveal a religious purpose, and that the limited pieces of background evidence highlighted for the contention that the policy's secular purpose was a sham could not "strip the policy of [its] secular purpose. No matter what an individual board member may have hoped — and they said nothing on the record about codifying this policy — Duval County's policy is facially neutral and undeniably evinces a secular purpose." *Id.* at 1089.

Adler V, 250 F.3d at 1334. See also *Adler I*, 851 F. Supp. at 451-52, App. 240a to 242a, where the trial court wrote as to the alleged intent or purpose of the Board members to similar effect:

> So, here, to the extent that the School Board was the institutional policy maker (rather than Superintendent Zenke and/or Ms. Reynolds) the purposes or intentions of the members of the Board are unknown. No debate was had and no vote was taken on the Reynolds memorandum of May 5. The discussion pointed to by the Plaintiffs had to do with an alternative proposal — the "moment of silence" — and the views that were expressed were those of three members, less than a majority. Furthermore, of those three, only one clearly expressed a preference for the retention of prayer as a board sanctioned activity. . . . [t]hat evidence is so attenuated as to have no probative value.

principals which expressly prohibited all prayers, benedictions and invocations at all graduation ceremonies. Thereafter, in 1992, the Fifth Circuit Court of Appeals decided *Jones v. Clear Creek Independent School District*, 977 F. 2d 963 (5th Cir.), *rehearing denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993). *Clear Creek* held that student initiated prayers at high school graduation ceremonies were constitutional under limited circumstances. After this holding, Dr. Larry Zenke, the Superintendent of the Duval County School System, and Ms. Reynolds received many inquiries about whether voluntary student initiated prayer at graduations was allowed. At Dr. Zenke's request, Ms. Reynolds sought an opinion from the Office of General Counsel, the Board's attorneys, on the status of the law in this sensitive area.[3]

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3. Petitioners misquote Dr. Zenke's deposition testimony at page 3 of the Petition. They also omit portions of the answer, which creates a misleading impression of the context to the Court. The full question and answer given are as follows:

> Q. What do you recall her communicating to you in terms of the gist of the memorandum [from The General Counsel's office]?
>
> A. Based upon her discussion and what was contained within the written opinion, that it would be appropriate for us to communicate to *principals* that they *could allow a student-initiated and student-led prayer within the commencement exercise, but the administration, adults, entirely should take a hands-off policy and be involved in no way*. She then at my direction developed a memorandum that went to principals in which she communicated that to our principals. (emphasis added)

Moreover, Superintendent Zenke was clear and unequivocal in testifying that it was not his intent to establish prayer or favor prayer over any other type of student message:

> Q. Was your purpose to establish prayer?

(Cont'd)

The General Counsel's Office reviewed the law, including *Lee v. Weisman*, *supra*, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) ("Lemon"), and numerous other Establishment Clause precedents, and concluded that the Constitution requires governmental neutrality toward religion and religious speech. The General Counsel's office recommended policy language to make it clear that the Board was not favoring any particular type of student speech and to completely remove governmental actors from students' private decision-making processes.

After receiving and discussing the General Counsel's Office's legal analysis with the superintendent, Ms. Reynolds sent a memorandum to all high school principals dated May 5, 1993, which adopted this recommendation and established the above substantive guidelines.

A. The 1993 Graduations

In 1993, graduations occurred at Duval County's 17 public high schools under the guidelines suggested in the Policy. At 7 of the 17 graduations (41% of the schools), there either was no religious content to any of the spoken messages of the students elected by their senior class peers, or no student message at all. *Adler IV*, 206 F.3d at 1072; *Adler V*, 250 F.3d at 1339. At the other 10 high schools, there was some form of religious speech. At one school, a Hindu student offered a prayer. 1SR-3-106-30, Zenke deposition.

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A. Absolutely not.

Q. Was it your purpose to favor prayer over any other message students might give?

A. Absolutely not.

Zenke deposition, p. 25, l. 18-22.

There is almost nothing in the record regarding whether any religious speech occurred at graduations from 1994 to the present.[4] The record simply does not substantiate Petitioner's unfounded assertion at page 4 of the Petition that the student messages "since enactment of the policy, have most often constituted prayers." Other than a composite exhibit containing various graduation programs (and one rank hearsay, conclusory affidavit the trial court chose not to strike), Petitioners introduced no evidence from the numerous graduations between 1994 and 1998 regarding the actual content of any of the student speakers' remarks. It is equally wrong for Petitioners to contend that there is "no doubt" that there has been a "predominance of prayer as a result of the policy from 1994 through 1997," or that Respondents have "never argued or produced evidence to the contrary." Petition, pp. 4-5 n.2. The record is virtually devoid of evidence as to what was spoken by the student speakers at graduations during those years, as the Board has consistently argued in this case, contrary to Petitioners' assertions.

B. Procedural History

The procedural history of this case is fully set forth in the prior published opinions of the District Court and the Eleventh Circuit.[5] Following the 1993 graduations, Plaintiffs' predecessors filed suit in federal district court in Jacksonville seeking to invalidate the Policy. The lead plaintiff in the first case was Karen Adler. Plaintiffs initially sought a preliminary injunction along with facial and as applied claims on the merits. Following discovery, the trial court held the Policy constitutional and granted the School Board's motion for summary judgment.

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4. The materials are primarily programs from various schools. *Adler v. Duval County School Board*, 174 F.3d 1236, 1241 (11th Cir. 1999) ("*Adler III*"), Petitioner's Appendix, p. 148a n.4. *See also* Exhibits to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction. 1SR-1-3, Exhibits Folder. Only exhibits 52 and 58 contain any specific comments of an arguably religious nature.

5. *See Adler I*, 851 F. Supp. at 446-48; *Adler IV*, 206 F.3d at 1071-73.

Adler I. Plaintiffs appealed. The Eleventh Circuit affirmed without reaching the constitutional issues in *Adler v. Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997) ("*Adler II*"), holding that the claims for injunctive and declaratory relief were moot due to the graduations of various student plaintiffs and that the damages claims had been waived. *Adler IV*, 206 F.3d at 1073.

This case, by Emily Adler *et al.*, was filed in May 1998, heard by the same district judge who heard and decided *Adler I*, and challenged the Policy on substantially the same record. New plaintiffs were selected to try to cure the mootness issues.

Plaintiffs sought a preliminary injunction, which the trial court consolidated with the trial on the merits with Plaintiffs' knowing consent. This left little time for supplemental discovery. *See Adler IV*, 206 F.3d 1073-74 n.4. As a result, there is essentially no evidence in the record as to the content of any religious speech which may have occurred in the graduations of 1994, 1995, 1996, 1997, or 1998. The trial court again sustained the Policy, this time in an unpublished order, and Plaintiffs appealed.

A three judge panel of the Eleventh Circuit initially reversed and found the Policy to be unconstitutional on its face in a 2-1 opinion. *Adler III*, 174 F.3d at 1251. The Board and Interveners then filed motions for rehearing *en banc*, which were quickly granted. The Eleventh Circuit held in a 10-2 *en banc* decision that the Policy is constitutional on its face.[6]

Following the Eleventh Circuit's initial *en banc* holding that the Policy is constitutional on its face, Appellants sought

6. This appeal presents only a facial challenge to the Policy. *Adler V*, 250 F.3d at 1332-33, 1338, 1341-42; *Adler IV*, 206 F.3d at 1073-74. The Policy *on its face* does not call for votes to be taken on "the specific issue of whether to include prayer at graduation." Nor does it call on its face for "senior class officers" to vote on the student speakers at graduation. Compare petition, page 4.

certiorari review, which was granted after *Santa Fe* was decided. This Court vacated the *en banc* holding by order dated October 2, 2000, *Adler v. Duval County School Board*, 531 U.S. 801, 121 S. Ct. 31, 148 L. Ed. 2d 3 (2000), and remanded for reconsideration in light of the holding in *Santa Fe*. Upon reconsideration, the Eleventh Circuit has determined that the *Santa Fe* policy is "fundamentally different" from the Duval County policy "in many crucial respects," *Adler V*, 250 F.3d at 1334, and it has reaffirmed and reinstated its prior decision.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's *en banc* decision is constitutionally correct. This Court's holding in *Santa Fe* is not in conflict with it, and the *en banc* decision should be left undisturbed.

The *en banc* decision in *Adler V*, reaffirming that the Duval County policy of permitting a graduating student, elected by her class, to deliver a brief unrestricted message of her choice at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause, properly recognizes that private religious speech in high school graduation ceremonies must be accommodated in a neutral fashion by the government. This Court's holding in *Santa Fe* does not alter this analysis or conclusion. To the contrary, the Eleventh Circuit's holding is fully consistent with the holding in *Santa Fe* because there are fundamental differences between the history, practices and policy provisions in Duval County, as compared to those in the Santa Fe Independent School District, which clearly distinguish *Santa Fe* from this case.

This Court invalidated the *Santa Fe* policy because that policy was specifically designed to perpetuate a longstanding practice of sectarian Christian prayer at football games. The Santa Fe policy deliberately promoted prayers, given the evolution behind the policy and its express terms. Students specifically voted on *whether to pray* at games, a constitutionally

improper subject for a majoritarian student vote. The *Santa Fe* policy also lacked a legitimate secular purpose under the *Lemon* test. Since the same student delivered the prayers all season long, and since football games are informal events where solemnization is inappropriate, the alleged secular purposes the district advanced in support of its policy were a sham. Further, the policy as designed and implemented provided school administrators with significant censorship and content controls over the student speech to make sure that the prayers were consistent with the government's goals. In sum, the *Santa Fe* policy endorsed and encouraged an inevitable pregame prayer with the administration's blessing.

This is in stark contrast to the Duval County Policy, which the Eleventh Circuit has determined to be fundamentally different factually from the *Santa Fe* policy. The Duval County Policy neither contemplates, establishes, encourages nor prohibits religious speech. It merely permits graduating senior classes to decide whether or not to include unrestricted messages as part of their ceremonies. If so, they choose a speaker who, alone, decides what to say. Government monitoring, control, and content review are expressly prohibited. Any student speech is therefore purely private and is not attributable to the state. There is no government endorsement, encouragement or sponsorship of coercive formal religious exercises, and thus no violation of this Court's holding in *Lee v. Weisman*, *supra*.

The Duval County Policy also complies fully with the three prong *Lemon* test: the secular purpose, primary effect, and excessive entanglement standards. The Eleventh Circuit determined that the Duval County Policy has a legitimate secular purpose, including allowing students to direct a portion of their own graduation ceremony and permitting student freedom of expression. Since it is a graduation speech policy, not a football game prayer policy, solemnization also is an appropriate secular purpose which it advances. The Policy also satisfies the primary effect prong of the *Lemon* test because it allows either religious

or secular speech equally on its face. It is purely content-neutral and does not even require that any graduation message occur at all, let alone dictate its content. During the 1993 graduations which occurred under this Policy, the students chose to have purely secular content, or no messages at all, 41% of the time. There was some form of religious speech at the other ceremonies. This roughly equally divided result is consistent with, and evidence of, the facial content and viewpoint neutrality of the Policy. Finally, the Policy does not violate the excessive entanglement prong, because government review, monitoring and control of content is prohibited. This keeps government out of censoring or predetermining student's private choices.

Most importantly, *there is no unconstitutional majoritarian vote to pray* which infringes on minority rights under the Duval County Policy. The majoritarian vote this Court found to be unconstitutional in *Santa Fe* was a specific vote by the students on whether or not to have prayers at football games. The parties in *Santa Fe* stipulated to this point. *Santa Fe*, 530 U.S. at 317 n.24. Minority views were completely frozen out. In contrast, the Duval County Policy is purely content-neutral. Students vote only on whether or not there may be *speech*, free speech, in the form of a brief message, unrestricted in theme or content, near the beginning or end of the graduations. If so, a single student, wholly free of government involvement or direction, then decides what to say, not the school board, not the principal, and not any senior class majority. The subject can be anything. It may be religious, or not. It may be a greeting or a farewell. There may be no remarks at all.

Both factually and constitutionally, the Duval County Policy and the *Santa Fe* Policy are fundamentally different. The Petition for Writ of Certiorari therefore should be denied, as the *en banc* holding of the Eleventh Circuit is correct on the merits of this case.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *SANTA FE* DOES NOT CONFLICT WITH THE *EN BANC* DECISION IN *ADLER V*, AND THE EN BANC DECISION SHOULD BE LEFT UNDISTURBED.

The Eleventh Circuit, *en banc*, framed the issue on appeal as follows in *Adler IV*:

> The central issue presented is whether the Duval County school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the beginning and/or closing of graduation ceremonies is facially violative of the Establishment Clause.

206 F.3d at 1073. The Court concluded:

> Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause merely because an autonomous student speaker *may* choose to deliver a religious message.

Id. at 1073-74 (emphasis in original).

Early in its opinion on remand in *Adler V*, the Eleventh Circuit states by way of overview how it proceeded, what it decided, and why:

> Having carefully reviewed the Supreme Court's opinion, and considered supplemental briefs from the parties and amici, we conclude that *Santa Fe*

> does not alter our previous en banc decision, and accordingly we reinstate that decision and the judgment in favor of Duval County. Nevertheless, we take this opportunity to explain why we believe that *Santa Fe* does not alter the outcome of this case. Simply put, after (as before) *Santa Fe*, it is impossible to say that the Duval County Policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations, no matter how private the message or how divorced the context of the message may be from any state review, let alone censorship. *Santa Fe* does not go that far, and we are not prepared to take such a step.

Adler V at 1332. (emphasis added).[7] The holding in *Santa Fe* neither changes the appropriate questions to be considered, nor dictates a different decision than in *Adler IV* and *V*.

A. The *en banc* holding is consistent with this Court's holding in *Santa Fe*.

The Petition devotes only one sentence at the bottom of page 6 to summarize the reasoning of the Eleventh Circuit that it asks this Court to overturn. Unlike the Petitioners, the Eleventh Circuit went into considerable depth in its analysis of why *Santa Fe* does not affect the outcome in this case. A brief discussion of the essential points in the Court's reasoning, and why the holding is correct, follows.

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7. The Eleventh Circuit repeatedly emphasized that this appeal presents only a facial challenge to the Policy. *See* footnote 6 above. Issues on whether implementation of the Policy deviated on occasion in practice from the stated guidelines is not before the Court. Petitioners' as applied challenges were waived below. *See Adler IV*, 206 F.3d at 1073 n.4.

1. The *Santa Fe* Policy, unlike the Duval County School Board Policy, expressly promoted prayer.

In *Santa Fe*, the Santa Fe Independent School District had a long history of acts plainly favoring and endorsing proselytizing sectarian Christian pursuits. The district promoted attendance at Baptist revival meetings, encouraged membership in religious clubs, chastised children of minority beliefs, distributed Gideon Bibles on school premises, allowed students to read Christian invocations and benedictions from the stage at graduations, and delivered overtly Christian prayers over the public address system at football games. 530 U.S. at 294-95.

Over a period of two years, the *Santa Fe* school district passed a series of graduation policies and football policies which undeniably intended to preserve existing practices involving government sanctioned prayers. The final football policy (modeled after the graduation policies) was before this Court for review. The first graduation policy prohibited invocations or benedictions by clergy and formal religious exercises. The district then decided to "permit" graduating seniors, with "the advice and consent of the senior class sponsor," to elect to have "nonsectarian, nonproselytizing invocations and benedictions." After an interim district court order in May 1995 permitted "nondenominational prayer" for the 1995 graduation,[8] a third policy was passed calling for secret student ballots and keeping the "nonsectarian and nonproselytizing" requirement. In July 1995, a fourth policy deleted that requirement but would

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8. *See Doe v. Santa Fe Independent School District*, 168 F.3d 806, 810-12 (5th Cir. 1999). The text of the order leaves absolutely no doubt that the school district *and* the district court intended to approve prayers at graduation, and it is against this backdrop that the football policy had to be interpreted. The Court's Order on Plaintiffs' Motion for Temporary Restraining Order permitted "student selected, student-given, nonsectarian, nonproselytizing invocations and benedictions." It also stated

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automatically reinstate it if the policy were enjoined without it. 530 U.S. at 295-96.

In August 1995, the district enacted a "Prayer at Football Games" policy which was similar to the July graduation policy, including a similar fallback provision. In October 1995, the district adopted another football game policy omitting the word "prayer" from the title, and referring to "messages" and "statements," but, significantly, retaining mention of "invocations." *Id.*

On August 31, 1995, under the first football policy, "the district's high school students voted whether a student will deliver prayer at varsity football games." A week later, they elected a student "to deliver the prayer at varsity football games." 530 U.S. at 297. No new vote occurred under the last football game policy. 530 U.S. at 309.

2. The Duval County Policy (in *Adler V*) and the *Santa Fe* Policy are Fundamentally Different.

Both factually and constitutionally, the Duval County Policy and the Santa Fe Policy are fundamentally different. These differences include the following:

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> general prayers to the "Almighty", or to "God", or "Our Heavenly Father (or Mother)" or the like, *will of course be permitted*. Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, *will likewise be permitted*, as long as the general thrust of the prayer is nonproselytizing as required by [Clear Creek II].

168 F.3d at 811 (emphasis added). The Fifth Circuit reversed as to the "nonsectarian" prayers portion of the order. *Doe*, 168 F.3d at 822.

a. Unlike the Duval County policy, the *Santa Fe* Policy would inevitably result in prayer and the exclusion of minority views.

Under the *Santa Fe* policy, this Court found that an affirmative vote meant prayers would always result and minority views would never be expressed:

> . . . the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

530 U.S. at 304. The result would be "an inevitable pre-game prayer." 530 U.S. at 308.

In contrast, the Duval County Policy does not result inevitably in prayer. As the Eleventh Circuit stated in *Adler IV*, its first *en banc* opinion: "No religious result is preordained under the [Duval County] policy." *Adler IV*, 206 F.3d at 1084. Nor are minority viewpoints excluded. As noted above, in 1993, under the Duval County Policy, 41% of the high schools either had no message or had a message without religious content. Of the remaining messages, one was a prayer given by a minority speaker, a Hindu student. The neutral provisions of the Duval County Policy — neither requiring nor prohibiting religious expression — have yielded divided results in practice. Students have gone both ways, approximately equally, in exercising their choices.

b. Unlike the Duval County Policy, the subject of the *Santa Fe* vote was improper.

The *Santa Fe* policy involved a specific vote on whether to have prayer at varsity football games. 530 U.S. at 316. The policy was facially invalid "because it impermissibly imposes on the student body a majoritarian election on the issue of prayer." *Id.*

On remand, the Eleventh Circuit quite specifically and correctly noted the importance to this Court of the fact that the vote in *Santa Fe* was on *whether or not to pray*. *Adler V*, 250 F.3d at 1334-35, 1337-39.

By contrast, the Duval County Policy does not involve a majority vote on prayer, or even on religion in general. It is viewpoint neutral.[9] The Eleventh Circuit recognized this and stated that:

> . . . *unlike a direct student plebiscite on graduation prayer, not even the senior class exercises control over the content of the graduation message*. That decision rests solely with the elected student speaker — with neither the senior class nor the school exercising any sort of editorial oversight . . .

Adler IV, 206 F.3d at 1076. (emphasis added)

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9. Petitioners' reliance on this Court's holding in *Board of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), is misplaced. In *Southworth*, this Court found a referendum feature of student activity fee funding mechanisms to be of concern "to the extent the referendum substitutes majority determinations for viewpoint neutrality" and does "nothing to protect minority views," but rather holds such views "at the mercy of the majority." *See* 529 U.S. at 235; *Santa Fe*, 530 U.S. at 304. *Southworth* does not stand for the broad principle Petitioners suggest at p. 11 n.5 of the Petition, that "[E]ven in a limited public forum, participation determined by majority vote is unconstitutional." *Southworth* supports the School Board's Policy and the *en banc* decision. The Court held that the government was not the speaker, even though it enacted the fee to create the forum for the student speech. 529 U.S. at 235. Similarly, under the Duval County Policy, the District is not the speaker in this case simply because it provided the forum where the student speech occurred.

c. Unlike the Duval County Policy, the alleged secular purposes under the *Santa Fe* Policy were a sham.

This Court found the alleged secular purposes behind the *Santa Fe* policy were a sham. It found the district's several successive policies were intended to "preserve the practice of prayer before football games." 530 U.S. at 308-09. After the first class vote to have an invocation or prayer under the first version of the football policy, no new vote was taken after the policy was ostensibly but transparently broadened to add "statements" and "messages" alongside of "invocations," and the explicit reference to prayers was removed. The Court considered this to be strong evidence of a sham purpose to perpetuate an existing policy and practice of prayer:

> This history indicates that the District intended to preserve the practice of prayer before football games. *The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy*. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee*, 505 U.S., at 596.

530 U.S. at 309 (emphasis added).

Football games contrast sharply with the "singular context and singularly serious nature of a graduation ceremony," "a significant, once-in-a-lifetime event," 530 U.S. at 300, where solemnity is highly appropriate. *Cf. Lynch v. Donnelly*, 465 U.S.

668, 693, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring). Moreover, the *Santa Fe* policy did not advance student free speech rights because the same student delivered the pre-game prayers all season long and because the government limited the content and diversity of the remarks. 530 U.S. at 303-04. By contrast, the Eleventh Circuit concluded that the Duval County Policy had a secular purpose, including "affording graduating students an opportunity to direct their own graduation ceremony" and "permitting student freedom of expression." *Adler V*, 250 F.3d at 1334. *See also Adler IV*, 206 F.3d at 1085-86, where the Court identified three separate secular purposes the Duval County Policy advances.

d. Unlike the Duval County Policy, there was extensive governmental involvement under the *Santa Fe* policy which caused the resulting student speech not to be private speech, but rather attributable to the government.

The *Santa Fe* policy had direct school administrative involvement in the student election process *and* in the form of content restrictions of the student expression to insure consistency with purposes of the school administration (*i.e.*, "entanglement" under *Lemon*). Santa Fe's seniors could elect to have a "statement or invocation" upon the "advice and direction of the high school principal." 530 U.S. at 298 n.6. There were "particular regulations that confine the content and topic . . ." 530 U.S. at 303. Government control not only was possible, but required. By contrast, the Duval County School Board Policy contains no content and topic requirements, and it prohibits all government monitoring, advice and direction. There is no censorship or governmental control. The speech, if there is any, is truly private. In *Adler IV*, the Eleventh Circuit stated:

> . . . under the Duval County graduation policy, however, neither the School Board nor its principals

> may ordain, direct, establish, or endorse a religious prayer or message of any kind. Indeed, by the very terms of the policy, a religious message may not even be offered at graduation. The Duval County policy *explicitly divorces* school officials from the decision-making process as to whether *any* message — be it religious or not — may be delivered at graduation at all.

Adler IV, 206 F.3d at 1076. In *Adler V*, the Eleventh Circuit reiterated the crucial distinctions:

> Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the Santa Fe policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message," *Santa Fe*, 120 S. Ct. at 2276; and (2) the policy, "*by its terms,* invites and encourages religious messages," *id.* at 2277 (emphasis added). Those two dispositive facts are not present here, and that makes all the difference.
>
> First, the Duval County policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered. Indeed, school officials are affirmatively *forbidden* from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views:
>
> > If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and

> *shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees.* [ ]The purpose of these guidelines is to allow students to direct their own graduation message *without monitoring or review by school officials.* 206 F.3d at 1072 (quoting policy) (emphasis added).

This is in sharp contrast to the Santa Fe policy, under which any message was subject to content regulation by the state. The Santa Fe policy dictated that the process of selecting a speaker and delivering the message was subject to the " 'advice and direction of the high school principal.' " 120 S.Ct. at 2273 n. 6. As part of that process, school officials were effectively authorized to review the message itself to ensure that it was " 'consistent with the goals and purpose of th[e] policy.' " *Id.* The policy therefore created virtually no check on school officials' power to regulate the proposed student message, giving almost unfettered discretion to state officials acting under the guise of determining that the message would be " 'appropriate'." *Id.*

* * * *

Second, unlike Santa Fe's policy, the Duval County policy does not "by its terms, invite[ ] and encourage[ ] religious messages." 120 S.Ct. at 2277. On the contrary, the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message.

* * * *

The fact that the text of the Santa Fe policy expressed a clear preference for religious messages was a key

> factor in the Court's determination that student speech delivered pursuant to that policy would be viewed as state-sponsored. *Id.* at 2278-79; *compare also id.* at 2281 ("[N]othing in the Constitution . . . prohibits any public school student from praying. . . . But the religious liberty protected by the Constitution is abridged when the State *affirmatively sponsors* the particular religious practice of prayer.") (emphasis added). In this case, the text setting forth the Duval County policy contains no language approving an "invocation" and no other provision that could fairly be read to require or approve a "religious" theme.

Adler V, 250 F.3d at 1336-38 (emphasis and parenthetical in original).

e. Unlike the Duval County Policy, the *Santa Fe* Policy endorsed and encouraged prayer.

The wording of the *Santa Fe* policy "invites and encourages" prayer by expressly endorsing the term "invocation" in the text. 530 U.S. at 306-07. ("Indeed, the only type of message that is expressly endorsed in the text is an "invocation" . . . ."). The district's objective toward this end was crystal clear. The last line of the *Santa Fe* policy states that any speech "must be nonsectarian and nonproselytizing," clearly religious terms. There was "only one, clearly preferred message": Santa Fe's "traditional religious 'invocation.' " 530 U.S. at 315.

By contrast, Duval County's content-neutral Policy contains no reference to or encouragement of prayer, invocations, benedictions, proselytizing, or any other religious message. The Eleventh Circuit stated:

> The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down

> vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message. *Santa Fe* does not remotely state or suggest that the term "message" connotes prayer, nor could it plausibly give so narrow a meaning to so broad a term. Instead, the Court repeatedly focused on the Santa Fe policy's use of the *additional* term "invocation," and drew from that term and the school district's concessions the conclusion that Santa Fe's policy mandated a vote on prayer. *See id.* at 2277. Similarly, there is no suggestion in *Santa Fe* that the terms "opening" and "closing" as used in Duval County's policy connote prayer. Indeed, those terms did not even appear in Santa Fe's policy. Simply put, "[w]hatever majoritarian pressures are attendant to a student-led prayer *pursuant to a direct student plebiscite on prayer* are not facially presented by the Duval County policy." 206 F.3d at 1083 (emphasis added).
>
> Although it is possible that under Duval County's policy the student body may select a speaker who then chooses *on his or her own* to deliver a religious message, that result is not preordained, and more to the point would not reflect a "majority" vote to impose religion on unwilling listeners.

Adler V, 250 F.3d at 1338-39 (emphasis and parenthetical in original).

While the Santa Fe Independent School District wanted prayers, the Duval County School Board took a neutral position and left the matter up to the individual private student speakers.

II. THERE IS NO CONFLICT BETWEEN *ADLER V* AND DECISIONS IN OTHER JUDICIAL CIRCUITS REQUIRING THIS COURT TO INTERVENE TO ASSURE CONSISTENCY OF OPINIONS.

The Petition asserts that this Court should grant review due to a conflict among the approaches in the Eleventh Circuit, the Third Circuit and the Ninth Circuit. Petition, pp. 12-14. There is no such conflict. It also asserts that the approach in the Fifth Circuit is contrary to the Eleventh Circuit's holding, and has not been reviewed by the Court because the Fifth Circuit's decision in *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999) was not reviewed to the extent that that decision discussed the Santa Fe Independent School District's graduation policies. That assertion totally lacks merit.

At present, there is no decision in the Ninth Circuit in conflict with the Eleventh Circuit's *en banc* holding. The two cases cited in the Petition, *Harris v. Joint School District #241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), and *Doe v. Madison County School District #321*, 147 F.3d 832 (9th Cir. 1998), *vacated and dismissed*, 177 F.3d 789 (9th Cir. 1999), have been vacated. They are of no precedential effect. There is another Ninth Circuit case, which petitioners do not cite, but which respondents-interveners cite in their brief in opposition, *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1228, 149 L. Ed 2d 138 (2001), which deserves brief mention. In *Cole*, the Ninth Circuit affirmed a decision in which a school principal refused to allow a sectarian proselytizing valedictory speech and a sectarian invocation. The principal was advised in advance of the content of intended remarks, and retained content control. Had the school district not so acted, it could have violated the Establishment Clause by failing to stop the presentations.[10]

---

10. A recent district court decision in the Ninth Circuit is to similar effect. *Lassonde v. Pleasanton Unified School District*, __ F. Supp. 2d __, 2001 WL 1181026 (N.D. Cal. October 2, 2001).

That is virtually the exact opposite of the posture of the facts and policy in this case, where students are afforded an opportunity to make brief uncensored remarks with no advance censorship or review by school administrators. *Cole* provides no conflict with the Eleventh Circuit's decision, and no basis for granting review here.

Similarly, the Third Circuit's decision in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*), is not in conflict with the Eleventh Circuit's decision in this case. In *Black Horse Pike*, senior class officers were allowed to poll the graduating class to determine whether the seniors wanted "prayer, a moment of reflection, or nothing at all" to be included as part of the graduation ceremony. 84 F.3d at 1475. Thus, there was a specific vote on prayer. On its face, the policy was suggestive of a religious result. The Duval County Policy lacks such shortcomings. As the Eleventh Circuit noted in *Adler IV*:

> In contrast to each of these policies [in other federal circuits], Duval County students vote on whether to have a message of unspecified content delivered by a student. This is a meaningful distinction.

206 F.3d at 1079 n.7.

As to the portion of the Fifth Circuit's *Santa Fe* decision addressing the graduation prayers, *see* Petition, p. 12, this Court undoubtedly had good reasons for not granting certiorari on those provisions, while granting certiorari only on the football game policy issues. The graduation policy provisions in *Santa Fe* are clearly distinguishable from the Duval County Policy provisions, as the *Santa Fe* graduation provisions are replete with religious phraseology, as noted above. *See also Santa Fe*, 530 U.S. at 295-96. There is no conflict needing resolution as to the Fifth Circuit's holding in this regard.

Nothing in the Eleventh Circuit's reinstated *en banc* decision is in conflict with the holdings in the other federal appellate circuits discussed above. Accordingly, conflict among the circuits provides no basis to grant review of the decision in this case.

CONCLUSION

The Duval County School Board's Policy achieves the neutrality the Constitution requires. It neither requires nor prohibits religious speech at high school graduations, but does allow it if a graduating senior, a private speaker with full First Amendment rights under the Constitution, *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), so chooses.

In contrast, the sectarian prayers delivered under the *Santa Fe* policy were intended and expected by the school district and could not properly be considered private speech. The *Santa Fe* policy was constitutionally defective because: (1) prayers would always result; (2) minority views would always be excluded; (3) prayers were the specific subject of the student vote; (4) the alleged secular purposes behind the policy were a sham; (5) there was excessive governmental entanglement; and (6) there was a clear endorsement and encouragement of religion by the school district.

None of these constitutional defects is present as to the Duval County Policy. Under the Duval County Policy: (1) either no speech, *or* secular *or* religious speech, can and does result in actual practice; (2) minority students' views, such as in the selection of a Hindu speaker at one of the 1993 graduations, may be expressed; (3) the subject of the majority senior class vote in Duval County is whether an unrestricted message, *not prayer specifically*, should occur; (4) a legitimate secular purpose is served; (5) there is no governmental involvement in the speech decisions of the students because government monitoring and

review are expressly prohibited; and (6) the Policy embodies pure governmental neutrality, not endorsement and encouragement of prayer.

Unlike the impressionable middle school students in *Lee v. Weisman*, graduating seniors are mature enough to know and appreciate that when one of their own chooses freely how to express herself or himself under the Policy at issue in *this* case, it is not the act of the government establishing, endorsing or encouraging religion in a coercive fashion. *Compare Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)

> . . . [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis*. (Emphasis added, citations omitted).

It is a classmate acting as an individual without government sponsorship or interference, even if it occurs in public at an organized, solemn school event, and even if it is religious in nature. *See Lee v. Weisman*, 505 U.S. at 630 n.8

> If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

(Justice Souter, joined by Justices Stevens and O'Connor, concurring).

If petitioners' arguments as to the Policy in this case were correct, this Court could have declared long ago, as a clear, *per se* principle of constitutional law, that there may never be public religious expression on stage at high school graduations because someone in attendance might be opposed. It has not done so yet, and it should not and need not do so now.

The petition for writ of certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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No. 01-287

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

V.

DUVAL COUNTY SCHOOL BOARD, *et al.*,

Respondents,

V.

SUSAN BOLES, *et al.*,

Respondents-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS-INTERVENORS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a neutral policy that allows a student volunteer elected by the graduating senior class to deliver a message at the beginning and/or conclusion of the graduation ceremony, which message is not pre-reviewed, censored, edited, or directed by school officials and which message can be secular or religious in nature, is constitutional on its face.

2. Whether an injunction requiring school officials to censor all religious content of a message given by a volunteer student of the senior class during a high school graduation ceremony at a time and place where uncensored, student-initiated, student-led, secular speech is permitted violates the Establishment Clause.

3. Whether an injunction requiring school officials to censor all religious content of a message given by a volunteer student of the senior class during a high school graduation ceremony at a time and place where uncensored, student-initiated, student-led, secular speech is permitted violates the student's right to freedom of speech.

4. Whether an injunction requiring school officials to censor all messages with a religious viewpoint on an otherwise includable topic given by a volunteer student of the senior class at a high school graduation ceremony violates the student's right to freedom of speech.

PARTIES

The Petitioners consist of past and current students of various schools within the Duval County School District, and they include the following: Emily Adler, Bonnie Bear, Aaron Finck, Benjamin Finck, Rachel Finck, Seth Finck, Tyler Hurley, Monica Juodvalkis, Lucy Nord, Roberta Nord, Jonathan Rand, and Joshua Weihnacht.

There are two categories of Respondents. The Respondents include the Duval County School Board and the Duval County Public School District.

The Respondents also include various student-intervenors who attend schools within the Duval County Public School District. These students and parents moved to intervene as Defendants-Intervenors and are listed below before the Eleventh Circuit Court of Appeals as Movants-Intervenors and herein as Respondents-Intervenors. These Respondents include Susan Boles, Ronald Boles, Rebecca Boles, Mark Muhlbauer, Kenneth Carkhuff, Karlene Carkhuff, Ashton Carkhuff, Stan Carter, Susan Carter, Sarah Carter, Mark Sciullo, Jody Sciullo, Moriah Sciullo, Nicholas Sciullo, Douglas Pigg, Charlotte Pigg, Jonathon Pigg, and Tim Howard.[1]

---

[1] Petitioners' Petition for Writ of Certiorari listed the Respondents-Intervenors in a footnote. However, the undersigned has represented student-intervenors in this case since the 1993 initial cause of action and the student-intervenors through the undersigned presented arguments on the merits in the present cause of action before the Eleventh Circuit Court of Appeals in 1998 and again before the *en banc* panel in 1999. The *en banc* panel of the Eleventh Circuit Court of Appeals requested the Respondents-Intervenors to address two substantive questions addressed on appeal, namely whether the Guidelines on their face violated the Establishment Clause and whether injunctive relief is a workable remedy under the facts of this case. Respondents-Intervenors then filed their supplemental brief with the Eleventh Circuit following this Court's remand.

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STATEMENT OF THE CASE

This case involves a facial challenge to certain Guidelines within the Duval County Public School District (hereafter "Board") which address student-initiated, student-led messages at graduation ceremonies in Duval County. In the spring of 1993, Larry Zenke, Superintendent of Schools for Duval County, asked Vicki R. Reynolds, Duval County School Board's Liaison for Legal Affairs, to look into the issue of student messages during graduation ceremonies by consulting with the General Counsel's Office. Ms. Reynolds initiated a legal request to the General Counsel's Office and received a legal opinion from that office in April, 1993. This opinion took the policy approved by the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), and made it neutral. Based on that opinion, Ms. Reynolds issued the memorandum of May 5, 1993, to all high school principals. That memorandum (hereafter "Guidelines") states in pertinent part:

> 1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises, shall rest within the discretion of the graduating senior class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these Guidelines is to allow the

> students to direct their own graduation message without monitoring or review by school officials.

Ms. Reynolds testified that it was not her intent for the Guidelines to mandate student-led messages at graduations. Dr. Zenke testified that he did not have a purpose to violate the Constitution, to establish prayer or to favor prayer over any other message students might give. Dr. Zenke also stated that it would be inappropriate and impossible to prohibit or encourage prayer, because there is no prior review of the student messages.

On June 1, 1993, at the Board meeting, school board member Cheryl Donelan moved to have a moment of silence at graduation ceremonies in lieu of the suggested Guidelines. The motion failed by a vote of four to three. At least three school board members stated that they rejected Donelan's proposal in order to avoid a school mandated moment of silence. The Board members clearly desired to avoid the establishment of religion. Dr. Zenke stated that the Board was required to have a "hands off policy . . . to allow students to have their own message to communicate to fellow students." Dr. Zenke stated further that "students ought to have a very critical and whole role in that [graduation] program, both in planning and carrying it out."

In addition, school board members stated that the purpose and effect of the Guidelines was to allow the students to have free speech. Dr. Zenke stated, "I think the staff was trying to get clarification as to the latitude that students have in the issue as it relates to the first amendment." The content of the message is decided by the student.

In *Adler v. Duval County School Board.*, 851 F. Supp. 446 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*, 112 F.3d 1475 (11th Cir. 1997) (hereafter "*Adler I*"), the District Court found that

> while the Reynolds' memorandum of May 5 was not itself the subject of any specific vote by the

> Board, that memorandum was left in force with the acquiescence or tacit approval of the Board as its official policy governing the 1993 commencement exercises.

In early June 1993, following the Board meeting, the original Plaintiffs, consisting of three graduating seniors from Mandarin High School and a parent of a graduating senior, brought an action seeking to enjoin the Board from *permitting* student-initiated, student-led messages containing religious content at the 1993 public high school graduation ceremonies. These Plaintiffs also sought declaratory relief and damages. The undersigned counsel of record represented a separate group of students who were granted leave to intervene to oppose the claims of these original Plaintiffs and assert their own First Amendment rights of free speech and free exercise of religion at graduation ceremonies. In *Adler I*, on June 4, 1993, after a hearing in open court, the original Plaintiffs' Motion for Preliminary Injunctive Relief was denied. A renewed Motion for Injunctive Relief was also denied by written Order entered the following week. On January 3, 1994, the original Plaintiffs filed a motion for class action determination in this case asserting that the interests involved affected students in all high schools throughout Duval County. On January 19, 1994, the Motion for Class Action Certification was denied as untimely.

The 1993 graduation ceremonies at the seventeen high schools within Duval Country School District were conducted according to the Guidelines. The District Court found that the high school principals delegated decision-making authority to graduating senior students at each school to determine whether student messages should be given at the opening and/or closing of the graduation exercises. The District Court found:

> At ten of the seventeen high schools, it is undisputed that the students opted for messages that constituted various forms of religious prayer. At the remaining seven schools, however, it appears that either no messages were given at all, or that any that were given were entirely secular, having no religious aspects.

Adler, 851 F. Supp. at 449-50.

In *Adler I*, all parties, including the student-intervenors, moved for Summary Judgment, and on May 4, 1994, the District Court denied the original Plaintiffs' motion and granted the Board's and the Intervenors' Motions. Judgment was entered in favor of the Defendants and the Intervenors and against Plaintiffs. The District Court found that the Guidelines did not violate the Establishment Clause under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) or under *Lee v. Weisman*, 505 U.S. 577 (1992). The District Court also ruled that the graduation policy created a limited public forum for student messages, and to censor the religious content of said messages would violate the student-intervenors' right to free speech protected under the First Amendment.

The Plaintiffs in *Adler I* appealed the ruling. The undersigned counsel of record, on behalf of the Intervenors, argued before the Eleventh Circuit Court of Appeals in 1995, and again in 1996, after the Court of Appeals requested the case be reargued. On May 6, 1997, the Eleventh Circuit Court of Appeals affirmed in part, vacated in part and remanded the case to be dismissed because the Plaintiffs had graduated. *See Adler v. Duval County Sch. Bd.*, 112 F.3d 1475 (11th Cir. 1997) (hereafter "*Adler II*"). The Court found the damages claim had not been properly preserved, thus making the case moot.

This case now readdresses the same Guidelines challenged in *Adler I*. The complaint in this action was filed on Friday, May 15, 1998. The current Plaintiffs are new students who were not part of the decision in *Adler I*. Emily Adler is the sister of Karen Adler. Thus, the present case has the same name as the original matter. On May 27, 1998, the Respondents-Intervenors filed a Motion to Intervene with supporting memorandum of law and attached affidavits of student- intervenors. On May 27, 1998, the District Court heard argument on Plaintiffs' Motion for Preliminary Injunction. At the hearing, all parties agreed that the facts of the case remained the same, that all of the evidence submitted in the *Adler I* case be made a part of the present proceeding,

and all agreed that the case on the merits be advanced and consolidated with the hearing on the preliminary injunction under Fed.R.Civ.P. 65(a)(2). On May 27, 1998, the District Court entered an Order denying Plaintiffs' Motion and adopted the reasoning in *Adler I*. Also on May 27, 1998, the District Court entered an Order denying the Respondents-Intervenors' Motion to Intervene, stating the Intervenors' Motion to Intervene was "DENIED AS MOOT given the entry of the contemporaneous Order denying the application for preliminary injunction and directing the entry of judgment." On May 29, 1998, the Intervenors filed a Motion for Reconsideration of the District Court's denial of intervention requesting reconsideration of the District Court's May 27, 1998, Order denying intervention. On May 29, 1998, the District Court denied the Motion without prejudice to the right to be heard before the Eleventh Circuit Court of Appeals. On May 28, 1997, Plaintiffs filed their appeal. On June 1, 1998, Respondents-Intervenors joined in the appeal. Plaintiffs and Respondents-Intervenors also filed Emergency Motions requesting an expedited appeal. On June 9, 1998, the Eleventh Circuit Court of Appeals granted an expedited appeal and consolidated the Respondents-Intervenors' case (Case No. 98-2720) with the Plaintiffs' appeal (Case No. 98-2709).

In November of 1998, this matter was again argued for the third time before the Eleventh Circuit Court of Appeals. On May 11, 1999, the Eleventh Circuit, in a 2 to1 decision, found the Guidelines unconstitutional, in part because the Court ruled that students became state actors whenever they entered the graduation podium. On behalf of the Respondents-Intervenors, the undersigned counsel of record, along with the Board, filed separate Motions for Rehearing *en banc* which were granted on June 3, 1999, thus vacating the decision and setting the case for *en banc* oral argument. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (hereafter "*Adler III*"). The undersigned counsel of record then argued this case for the fourth time before a panel of twelve judges at the Eleventh Circuit Court of Appeals on October 19, 1999.

On March 15, 2000, the Eleventh Circuit Court of Appeals, sitting *en banc*, issued a 10 to 2 ruling upholding the

constitutionality of the policy. *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (en banc) (hereafter "*Adler IV*"). The Court construed the appeal as an appeal of a final judgment strictly pertaining to the facial constitutionality of the Guidelines. *Id.* at 1073 n. 4. The Court found that the Guidelines, which permit graduating students to vote on whether to select a student to deliver a message wholly of her own choosing at the beginning or closing of a high school graduation ceremony, did not violate the Establishment Clause. The Court found the Guidelines were "perfectly consistent with the theme of neutrality in Establishment Clause jurisprudence." *Id.* at 1077. The Court noted that the Guidelines were "content-neutral, and allow an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis." *Id.* Without deciding whether the Board had created a designated forum for student expression, the Court analogized the Guidelines to a line of open forum cases in which this Court held that "neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." *Id.*

The *en banc* Court acknowledged that there was a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *Id.* at 1071. The Court distinguished the Guidelines from other graduation "prayer" cases. Unlike other graduation "prayer" policies that only allow the choice of prayer or no prayer, the Guidelines in question allow the choice of a message, the content of which is solely up to the student. *Id.* at 1078-79. The Court rejected the argument that the students become state actors as soon as they participate in the graduation ceremonies, noting that such an argument would raise more free expression concerns and likely run afoul of the Free Exercise and Free Speech Clauses. *Id.* at 1080-81. The *en banc* panel found that the Guidelines did not violate this Court's *Lemon* or *Lee* tests. *See Adler*, 206 F.3d at 1083-91.

Following the *en banc* decision of the Eleventh Circuit, the Plaintiffs filed a Petition for Writ of Certiorari to this

Court. On June 19, 2000, this Court decided the case of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). This Court then granted, vacated, and remanded the Eleventh Circuit's *en banc* decision for further consideration in light of *Santa Fe*. The Eleventh Circuit requested additional briefing on the matter, and then reissued its decision on May 11, 2001, in the case of *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (hereafter "*Adler V*"). After carefully reviewing this Court's opinion, the Court concluded that the *Santa Fe* decision "does not alter our previous *en banc* decision, and accordingly we reinstate that decision and the judgment in favor of Duval County." *Id.* at 1332. The Court noted that it was "impossible to say that the Duval County policy *on its face* violates the Establishment Clause without effectively banning *all* religious speech at school graduations, no matter how private the message or how divorced the content of the message may be from any state review..." *Id.* The Court found that the policy was facially neutral and that the facts of *Santa Fe* were fundamentally different "in many crucial respects from the facts of this case..." *Id.* at 1334.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the *en banc* decisions do not conflict with this Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The facts of this case are fundamentally different than the facts in *Santa Fe*. The choice in *Santa Fe* was whether or not to have a prayer. The policy dictated the content of the message. The content of the message was therefore the choice of the school, and the only choice of the students was whether to have religious speech or no speech at all. In this case, the content of the message is not dictated by the school. The students choose whether to have a message, the content of which is solely up to the decision of the student speaker.

This case does not conflict with this Court's decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), or *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

There is no majoritarian vote on the content of a message, and therefore the majority has no power to override the voice of the minority. The only vote is whether to have a message, similar to voting whether to have a senior class president. The majority cannot control the content of the message, nor can the school dictate its content.

The Guidelines allow the students to decide whether to have a message at high school graduation, the content of which is left entirely to the student speakers. As such, the Guidelines have created a limited public forum for student speech. Within this forum the student volunteer can present a secular or religious message at his or her discretion. The school remains aloof and uninvolved. Since the Board has allowed the student speakers to select their own topics, including controversial subject matters, the Board has clearly created a limited public forum for student speech. Speakers can be excluded from this limited public forum only when the exclusion is necessary to serve a compelling interest.

The Guidelines do not violate the Establishment Clause. The Guidelines have a secular purpose of allowing secular and religious speech, and by allowing students to direct their high school graduation. Moreover, the Guidelines do not have the primary effect of advancing religion. Since the content of the message is left up to the individual student, the Board has no idea what message will be presented. The message can be secular, sacred, profane or profound. The Board remains aloof and uninvolved. The Board does not mandate the content of the message and is detached from the message.

The Guidelines are not coercive with regards to religious speech. The Board does not select the speaker or the content of the speech, and does not encourage a religious message. Clearly private religious speech has very little potential for coercion, and especially in the context where the Board remains aloof from the content of the message, there can be no governmental coercion.

Petitioners seek an injunction requiring the Board to censor student speech based solely on its viewpoint. Censorship

of student speech for religious viewpoint is unconstitutional in a designated public forum. If the Board did not create a designated public forum for student speech, an injunction censoring student religious speech would result in viewpoint censorship which is unconstitutional even in a non-public forum. Under the Guidelines the students can speak on any topic. However, an injunction censoring religious speech would allow the students to speak on any topic except from a religious viewpoint. Allowing an injunction to censor a religious viewpoint would violate this Court's recent decision in *Good News Club v. Milford Central School*, 121 S.Ct. 2093 (2001).

Requiring the Board to censor student messages by editing out religious content would violate the Establishment Clause by showing hostility toward religion and by creating excessive entanglement with religion. The Board would have to make doctrinal choices between what is and is not religious in order to censor the student's message.

REASONS FOR DENYING THE WRIT

While Respondents-Intervenors acknowledge that this case presents important and recurring questions regarding student speech at graduation ceremonies, Respondents-Intervenors respectfully request this Court to dent the Writ. If this Court grants the Writ, this Court should uphold the challenged Guidelines. The Guidelines are not about prayer but about speech. This case presents a facial challenge to the Guidelines. The facts in the *en banc* panel decisions below are unique. The Eleventh Circuit's decisions do not conflict with this Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The application of the policy in *Santa Fe* clearly dictated that the students had only one choice. That choice was to deliver a religious message or no message at all. Thus, the school dictated the content of the message through a surrogate. In this case, the school does not dictate the content of the message and has no authority over its content. The difference is fundamental and distinguishes the Eleventh Circuit's decisions from *Santa Fe*.

Moreover, this Court should deny the Petition for Writ of Certiorari because the Eleventh Circuit's decisions do not conflict with *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) or *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Unlike these cases, there is no majoritarian vote whereby the majority is empowered to censor the viewpoint of the minority. Although there is a vote, the vote is similar to the election of a senior class president. The majority cannot vote on the content of the message, and are in fact barred by virtue of the policy from voting on content. The vote is only on whether to have a message, the content of which is solely up to the individual. This is similar to voting on a senior class president, the content of his or her speech being left solely up to the president. The majority cannot control the content nor can the school direct or control the content. Neither the school nor the students have the power to promote one speech over the other or to censor one viewpoint. This case is consistent with this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Lee v. Weisman*, 505 U.S. 577 (1992).

This case is unique from any other graduation "prayer" case decided by any other Circuit. It, therefore, does not conflict with any other Circuit Court ruling. The Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), upheld a policy where the only choice was to pray or not to pray, and if the student sought to pray, the prayer had to be non-sectarian and non-proselytizing. The Guidelines are fundamentally different from the *Jones* policy. The Guidelines, unlike *Jones*, do not mandate prayer.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3rd Cir. 1996) (en banc), the Third Circuit found a school board policy unconstitutional that permitted the senior class to vote on whether to include a "prayer" at the high school graduation ceremonies. Again, the only choice in the Third Circuit case was to pray or not to pray.

In *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), the Ninth Circuit found unconstitutional a similar policy.

However, this policy, unlike the one at issue here, provided that the only choice was to pray or not to pray. More consistent with the Guidelines is the Ninth Circuit's case of *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc) (vacated for mootness because the student plaintiffs had already graduated). There the Ninth Circuit originally upheld a policy that allowed the top four graduating seniors to deliver non-censored messages where the student could choose to deliver an address, poem, reading, song, musical presentation, prayer, or any other pronouncement, the content of which the student alone controlled. The *Doe* case is similar to *Adler*. However, *Doe* was vacated on grounds of mootness following the graduation of the students. The only case with which the *Adler en banc* decisions potentially conflict is the Ninth Circuit decision in *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir 2000). With respect to the student who was elected solely for the purpose of presenting a prayer, the Eleventh Circuit is not in conflict. However, with respect to the valedictorian who was elected using secular and neutral criteria but who chose to include a religious message, to that extent the *Cole* decision conflicts with *Adler*. However, it appears that the *Cole* decision actually conflicts with the Ninth Circuit decision in *Doe*. Thus the *Cole* decision appears to be merely an aberration.

The Eleventh Circuit has handed down consistent opinions in the *Adler* decisions and in the case of *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

This Writ should be denied because the case at issue is not at conflict with any other graduation "prayer" case. This case does not involve a graduation "prayer" policy, but instead involves a graduation "speech" policy, the content of which is solely the decision of the student. The vote is not whether to have a prayer, but whether to have a message, the content of which is solely within the discretion of the student. Therefore, this Court should deny the Writ. If this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

I.

THE ELEVENTH CIRCUIT'S DECISIONS DO NOT CONFLICT WITH ANY OPINION OF THE UNITED STATES SUPREME COURT.

The decisions in *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (en banc) (*Adler IV*) and *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*), do not conflict with any decision of this Court. The *Adler* decisions are consistent with this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). This case does not raise the concerns of a majoritarian election imposing viewpoint discrimination, as this Court was concerned with in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) or in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The decisions do not violate this Court's opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), or in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A.

The *Adler* Decision Is Consistent With *Santa Fe*.

In *Santa Fe*, this Court held that a policy that permitted prayer only, given by a student who was not free to control the content of the speech, violated the Establishment Clause. *See Santa Fe*, 530 U.S. at 290. This Court held that the policy "allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is **subject to particular regulations that confine the content and topic of the student's message**." *Id.* at 303 (emphasis added). The key to understanding the holding of *Santa Fe* is found in the fact that the policy only allowed access to the forum for messages that were deemed "appropriate." "Santa Fe's student election system ensures that **only those messages deemed 'appropriate' under the district's policy may be delivered.**" *Id.* (emphasis added). The fatal flaw in *Santa Fe* was that the policy prescribed the **content** of the

message that was to be given and that a student was only allowed to give the particular message prescribed by the policy. The *Santa Fe* policy allowed the students access to the microphone only if the student speaker promised to *pray*. If the speaker did not want to *pray*, then the policy would not allow access to the microphone. In *Santa Fe*, if the student prayed, the student could speak; conversely, if the student chose not to pray, the student must remain silent.

This Court also placed great emphasis on the history of the policy which the Court believed indicated an intent on the part of the Santa Fe School District to preserve the practice of prayer before football games. *Id.* at 309. The Santa Fe School District viewed the policy as a continuation of previous policies which allowed prayer before football games. "Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'" *Id.* This Court rejected the District's argument that this was not a "prayer only" policy and stated, "The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly - that this policy is about prayer. ... We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Id.* at 315.

The holding in *Santa Fe* is heavily fact-dependent. This Court denied that its holding had broad implications beyond the specific factual context of the case. *See Id.* at 304 n.15 (stating that there is an "obvious distinction between this case and the typical election of a 'student body president, or even a newly elected prom king or queen.'"); *Id.* at 316 n.23 (stating that the holding did not invalidate all student elections).

The *Adler* court noted that the *Santa Fe* decision relied in substantial part on two facts: (1) the speech was subject to particular regulations that confined the content and topic of the student message, and (2) the *Santa Fe* policy by its terms invited and encouraged religious messages. *Adler*, 250 F.3d at

1336. The Guidelines differ in several respects. First, the Guidelines do not contain any restriction on the identity of the student speaker or the content of the message. School officials are forbidden from reviewing the content of the message and denied the opportunity to censor the message. *Id.* at 1336-1337. Second, the Guidelines do not by their terms invite or encourage religious messages. *Id.* at 1337. Unlike the Santa Fe policy which expressed a clear preference for religious messages, the Guidelines express no preference. The Santa Fe policy made it virtually impossible for the student election to be a referendum on anything other than prayer. In contrast, the Guidelines allow a vote only on whether a message is to be delivered, and if so, which student is to deliver a message. In *Adler*, the content of the message is not "preordained" and instead reflects the uncensored and "wholly unreviewable decision of a single student speaker." *Adler*, 250 F.3d at 1339. This led the *Adler* court to observe that "the differences between this case and *Santa Fe* are substantial and material." *Id.* at 1340.

Adler noted that this Court's decision in *Santa Fe* "did not rule that an election process itself is always incompatible with the Establishment Clause." *Adler*, 250 F.3d at 1340-1341. Nor did this Court in *Santa Fe* rule that merely because speech occurred on government property, it was automatically transformed into government speech. "What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message." *Id.* at 1341. The Guidelines eliminate all state control over the content of the message. Therefore, the *Adler* case does not conflict with *Santa Fe*.

B.

The Guidelines Do Not Substitute Majority Determinations For Viewpoint Neutrality.

The Guidelines do not substitute majority determinations for viewpoint neutrality. In *Southworth*, this Court was concerned that a student referendum could result in viewpoint discrimination. 529 U.S. at 235. This Court did not find that

the student referendum in *Southworth* in fact violated viewpoint neutrality. The case was remanded for further consideration.

In *Rosenberger*, this Court found that when the government follows neutral criteria and administers policies evenhandedly, there is no danger in violating viewpoint neutrality. 515 U.S. at 839.

The Guidelines do not substitute majoritarian determinations for viewpoint neutrality. The Eleventh Circuit noted, "It cannot plausibly be argued that *on its face*, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony." *Adler*, 250 F.3d at 1338.

> The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message.

Id.

The *Adler* court noted that the record did not support a finding that the majority imposed religion on the minority. In seven of the seventeen instances reflected in the record, "students voted for no message at all or for a student speaker who subsequently delivered an entirely secular message." *Id.* at 1339. In contrast, *Santa Fe* was concerned that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." 530 U.S. at 304. The same cannot be said for a facial challenge against the Guidelines, and therefore the *Adler* opinion does not conflict with any decision of this Court.

C.

The Guidelines Allowing Uncensored Student Messages Do Not Violate The Establishment Clause.

1. The Guidelines Do Not Violate Lemon v. Kurtzman.

The *Lemon* test states that a government regulation must have a secular purpose, its principal or primary effect must not be to endorse or denigrate religion, and it must not foster excessive entanglement with religion. *See Lemon*, 403 U.S. at 612-13. The Guidelines do not violate the *Lemon* test.

a. The Purpose Of The Guidelines Is Secular.

The *en banc* panel of the Eleventh Circuit found that the Guidelines have a secular purpose of affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker, by allowing students to solemnize graduation, and by allowing free speech on any topic. *See Adler*, 250 F.3d at 1342.

The Guidelines have a secular purpose and are neutral toward all student speech. An open forum policy promoting non-discrimination constitutes a valid secular purpose. *See Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board. of Educ. of Westside Community Sch. v. Mergens*, 406 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). The Establishment Clause is not implicated by treating all speech equally.

This first prong of the *Lemon* test "aims at preventing the relevant decision maker from abandoning neutrality and acting with intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*,177 F.3d 789 (9th Cir. 1999)(en banc), the Ninth Circuit affirmed a decision which found that a graduation policy "was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech... unwilling to trivialize the importance of bestowing responsibility on young adults." 147 F.3d at 837. Like this case, in *Doe* the policy simply allowed a student wishing to engage in sectarian or non-sectarian speech to do so without interference or promotion by the school.

> We conclude that the District's graduation policy survives the *Lemon* test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state... The significant control exerted by the school on the religious contents of the graduation program is missing. Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation.

Id. at 838.

b. The Guidelines Do Not Have The Primary Effect Of Advancing Or Endorsing Religion.

The Guidelines evince nothing more than accommodation of the student's right to free speech. The school does not pre-review or pre-screen the content of the message. The Board has no idea what the student will say before the student gets up and delivers his or her message. The Guidelines allow the school to remain neutral toward all speech, secular and religious.

An injunction against the Guidelines would require the government to abandon its neutral stance toward religion and become the final arbiter of what may or may not be considered religious. Such a position would inevitably lead to hostility towards religion rather than a position of neutrality as mandated

by the First Amendment. An injunction would place the government in the position of requiring the students to speak only the religious thoughts that government wants them to speak.

The *en banc* panel of the Eleventh Circuit found that the Guidelines do not have the primary effect of advancing religion because the Guidelines are content-neutral and allow a student message on any topic of the student's choice. *See Adler*, 250 F.3d at 1337.

The Guidelines "do not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. Most importantly, "the failure to censor is not synonymous with endorsement." *Mergens*, 496 U.S. at 245. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.*

It is clear that the Guidelines do not have the primary effect of advancing religion. It is true that the government may not delegate to a private citizen that which it may not do itself, *see Evans v. Newton*, 382 U.S. 296 (1966), but that is not the case here. In this case, school officials have no control over the content of what the student will say, or whether a student will say anything at all. The Board does not have control over who will give the student message. The Guidelines do not mandate prayer or any other speech for that matter, and thus, there is no government delegation in this case. School officials do not supervise the speech of the students.

This Court has stated, "Our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnely*, 465 U.S. 668, 683 (1984). "Not every law that confers an 'indirect' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). To require the government to remove any vestiges of religion from public life would violate the Establishment

Clause.

> [The] exclusion of religious ideas, symbols, and voices marginalizes religion... Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Mitch McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 189 (Winter 1992). In this case, an injunction requiring the government to censor out religious messages from student speech sends a message of hostility forbidden by the Establishment Clause.

c. The Guidelines Do Not Excessively Entangle The Government With Religion.

The Guidelines do not result in excessive entanglement of government with religion. In this case, government involvement is non-existent. The government has no control over who will give the message or what will be said. School officials do not supervise any aspect of the student message. A neutral policy granting students the right to free speech does not coerce religious conformance nor create excessive entanglement because it precludes the state from making religion-based inquiries.

The *en banc* panel below found that the Guidelines do not excessively entangle the Board with religion because the Guidelines remain facially neutral with respect to religion.

The Guidelines insulate the government from the necessity of scrutinizing the content of the student speech. The Guidelines avoid the need for the state to make religion-based exclusionary judgments. The Guidelines forbid entanglement by stating ***"the content of the message shall be prepared by the student volunteer"***. This Court has stated that the government would run a greater risk of excessive entanglement by

monitoring and censoring religious speech. *See Widmar*, 454 U.S. at 263. If school officials censored religious speech, they would certainly create excessive entanglement by excluding certain speech on the ground that it is religious. This Court has stated:

> We agree . . . that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech". Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Widmar, 454 U.S. at 272 n.11. "It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). An anti-religious censorship pen will lead to excessive entanglement of government with religion.

It is unconstitutional to distinguish between various forms of religious speech and non-religious speech.

> Merely to draw the distinction would require the University -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in the manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6 (citations omitted).

As Justice Souter has remarked, it is hard to "imagine a subject less amenable for the competence of the Federal Judiciary, or more deliberately to be avoided where possible"

than determinations about the religious content of speech. *Lee*, 505 U.S. 616-17 (Souter, J. concurring). *See also Amos*, 483 U.S. at 336 (it is a significant burden to require a religious person or organization "to predict which of its activities a secular court will consider religious"). The Guidelines do not excessively entangle government with religion. An injunction requiring the Board to appoint a bureaucratic censor whose job is to strike through any word deemed religious in a student's speech would create a tangled web between church and state.

2. The Guidelines Do Not Violate Lee v. Weisman.

This Court recognized that,

> *at graduation time* and throughout the course of the educational process, ***there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.***

Lee, 505 U.S. at 598-599 (emphasis added).

This Court has also stated that government coerces religious belief when the government directs a formal religious exercise by mandating prayer, choosing a clergy for the sole purpose of prayer, and providing guidelines on how to deliver a non-sectarian, non-proselytizing prayer. *See Lee*, 505 U.S. at 577.

Under the facts of *Lee*, this Court found coercion because the school (1) decided that prayer *should* be given, (2) selected a religious speaker to give the prayer, and (3) gave the religious speaker guidelines on how to give a non-sectarian, non-proselytizing prayer. *See Lee*, 505 U.S. at 587. In *Lee*, the "degree of school involvement" made it clear that the graduation prayers bore the imprint of the state. *Id.* at 590. This Court limited *Lee* to its specific facts. *Id.* at 599. The key to the Court's holding in *Lee* was the fact that it was the ***school*** which coerced the students to participate in a religious exercise. In this case, the Guidelines expressly prohibit

involvement from the school in the entire process of selecting the student to deliver the message and in what that student will say. It is impossible under these Guidelines to find that the ***state*** is coercing a religious exercise. This state involvement in *Lee* is simply not present in the case at bar. The government is in no way mandating prayer, or telling the students how to pray, or that they must pray at all. The government is simply allowing the students to exercise their right to free speech. In *Lee*, Justice Souter stated:

> If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state. But that is not our case.

Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

The *en banc* panel below stated that it was clear that the issue of the selection of the messenger and the content of the message, as found problematic in *Lee*, was not present here. A graduation free of all religious expression, compelled by the school's sponsorship of the event, is not required by the Establishment Clause. The *Adler* Court found no coercion in this case because "neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone 'require' or 'coerce' the student audience to participate in any privately-crafted message." 206 F.3d at 1083 (*Adler IV*). While ten of the graduation messages delivered pursuant to the Guidelines involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message. No religious result is preordained under the policy and consequently, no coercion exists. *Id.* at 1084.

There is simply no coercion present in the Guidelines because the only thing the Guidelines accomplish is to allow private, student-initiated speech. Such speech cannot constitute governmental coercion of religious belief. The Guidelines

present a different set of facts than *Lee*, and do not result in governmental coercion of religious belief.

II.

THE ELEVENTH CIRCUIT DECISIONS DO NOT CONFLICT WITH OTHER FEDERAL CIRCUITS.

After reviewing the other federal circuit cases involving student-led, student-initiated prayer at graduation, the Eleventh Circuit observed: "All of these cases involve direct student plebiscites on graduation prayer." *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1079 n.7 (11th Cir. 2000) (en banc) (*Adler IV*), *vacated and remanded*, 531 U.S. 801 (2000), *opinion reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*).

The Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), upheld a policy which permitted students to vote directly on whether to have a prayer at graduation. Although the Third and Ninth Circuits have come to an opposite conclusion, there is a fundamental difference between these two circuits and the Eleventh Circuit.

In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3rd Cir. 1996) (en banc), the Third Circuit found a school board policy unconstitutional that permitted the senior class to vote on whether to include a "prayer" at graduation. The Third Circuit case reviewed a "prayer only" policy where the only choice provided to the students was to pray or not to pray. Under the policy, the government dictated the religious content of the message. If the message contained no religious content, then there would be no message. The message was permitted only on the basis that its content included prayer. The students had no choice in the content of the message.

In *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), the Ninth Circuit found unconstitutional a "prayer only" policy. Under the policy, "the relevant speakers are instructed to

pray." *Id.* at 456-57. If the students want to speak, they must speak religiously. More consistent with the Guidelines is the Ninth Circuit's case of *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc). In *Doe*, the Ninth Circuit upheld a policy that allowed the top four graduating seniors to deliver a non-censored message of the students' choice. In this respect, the Ninth Circuit decision is similar to the *Adler* decision.

Admittedly, the Ninth Circuit has recently handed down a decision that seems inconsistent even within the same circuit. In *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), the Ninth Circuit ruled that a school district was correct in censoring a student who was selected by the class solely for the purpose of delivering a prayer at graduation. However, the *Cole* decision also upheld censorship of a valedictorian who was selected on neutral criteria but who decided to pray. This portion of the *Cole* decision is an aberration and does conflict with the Eleventh Circuit. In this respect, the *Cole* decision actually conflicts with the Ninth Circuit decision in *Doe*. Other than this aspect of the *Cole* decision, the *Adler* case does not conflict with the decision of any circuit.

III.

GRANTING AN INJUNCTION REQUIRING THE BOARD TO CENSOR RELIGIOUS VIEWPOINT IS UNCONSTITUTIONAL.

The Guidelines clearly create a designated public forum for student expression during graduation ceremonies. The Guidelines provide a forum for student-initiated, student-led messages during graduation, the content of which is under the sole discretion of the student. The student can give a secular or sacred message and may deliver profane or profound oratory. Under these circumstances, the Board has created a designated public forum for student-initiated speech. "To ascertain what limits, if any, may be placed on protected speech, [this Court has] often focused on the place of that speech, considering the

nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981); *United States v. Kokinda*, 497 U.S. 720 (1990). "A public forum may be created for a limited purpose such as use by certain groups." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 49 n.9 (1983). A designated or limited public forum is "created when the government opens property to the public for expressive activity." *Id.* "A limited public forum is a forum for certain groups of speakers or for the discussion of certain subjects." *Id.* at 591; *see also Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976). *See also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985). One factor is governmental intent. Courts have recognized that a designated public forum may be created during a graduation ceremony.

> ***If, for example, school officials have authorized students to choose which of them will speak, and have permitted those speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum.*** Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in the student's speeches.

Brody v. Spang, 957 F.2d 1108, 1120 (3rd Cir. 1992)(emphasis added); *see also Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)(recognizing that a school can create a public forum during the graduation ceremony).

The Guidelines create a designated public forum during high school graduation. The Guidelines do not prescribe the content of speech. The students have full and unbridled discretion as to whether a message will be included at the event, and, if included, its content. A student wishing to engage in sectarian or non-sectarian speech can do so without interference

or promotion by the school. Because the Guidelines allow any student speech on any topic, they have created a designated public forum.

Although the *en banc* panel below did not reach the public forum analysis, the *Adler* court analogized the Guidelines "to a long line of open forum cases in which [this] Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1077 (11th Cir. 2000) (en banc) (*Adler IV*), *vacated and remanded*, 531 U.S. 801 (2000), *opinion reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (*Adler V*). The *en banc* panel stated that a policy which permits access to both religious and secular student groups or speech in a neutral manner does not violate the Establishment Clause. *Id.* (*citing Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The *en banc* panel also noted that this Court extended the free speech or open forum analysis to public secondary schools in *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990). The *en banc* panel also correctly relied upon this Court's decision in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The *Adler* Court stated these cases "strongly suggest" that a policy, like the one at issue here, "which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression." *Adler*, 206 F.3d at 1078.

The Guidelines have created a designated public forum for student expressive activity during graduation ceremonies. Within this forum, the students are free to speak on any topic, secular or sacred, profane or profound. However, even if the Guidelines do not create a designated public forum for student expressive activity, the Petitioners' request for injunctive relief is nevertheless unconstitutional. This Court has stated that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on

an otherwise includable subject." *Cornelius*, 473 U.S. at 806.

"Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000). Under the Guidelines, more than one student is granted access to the stage at a time. The Guidelines allow for a message at the beginning and/or conclusion of the ceremony. Moreover, the Guidelines are district-wide, covering seventeen schools.

This Court reaffirmed "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 121 S.Ct. 2093, 2102 (2001). If this Court were to grant the Petition for Writ of Certiorari and later reverse the Eleventh Circuit, the remedy would require an injunction against the Board to actively censor the religious viewpoint of student graduation speakers. Such a result runs contrary to this Court's decision in *Good News Club*.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. The film was denied solely because of its religious viewpoint. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (*quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). This Court also ruled that the Establishment Clause is not implicated when property is used for religious purposes under an open access policy. *See Lamb's Chapel*, 508 U.S. at 394-395 (*citing Widmar*, 454 U.S. at 271).

The policy in *Lamb's Chapel* stated that the premises "shall not be used by any group for religious purposes." 508 U.S. at 387. Since the film series dealt with an otherwise includable or permissible topic, this Court found that the school unconstitutionally engaged in viewpoint discrimination by

prohibiting a religious viewpoint on a permissible topic.

Lamb's Chapel referred to the previous decision in *Widmar*, 454 U.S. at 263, thereby rejecting any Establishment Clause argument since the property also was used for secular purposes. *Lamb's Chapel*, 508 U.S. at 394-395.

In *Rosenberger*, the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. This Court declared that the ***"government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."*** 515 U.S. at 829 (emphasis added)(citations omitted).

Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. This Court rejected the University's argument that it did not engage in viewpoint discrimination because the guidelines discriminated against an entire class of viewpoints. "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.* at 831. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

This Court also rejected the University's Establishment Clause defense, stating, "**More than once** ***we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."*** *Id.* at 839 (emphasis added)(citations omitted). This Court concluded: "It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 842.

The *Adler* Court noted "a per se rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech Clauses." 206 F.3d at 1081 (*Adler IV*). The Court noted that even if the graduation ceremony is considered a non-public forum, "students still would possess free speech rights there." *Id.* The *Adler* Court noted that religion is a viewpoint and that student speakers would be expressing various viewpoints, including religious ones. To censor the religious viewpoint would violate the students' free speech rights even in a non-public forum. The *Adler* Court noted that "the Constitution does not prohibit the exercise of offensive speech at graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion." *Id.*

An injunction in this case would necessarily be viewpoint-based. Petitioners do not seek the suppression of all speech -- only speech of a supposed "religious" viewpoint. An injunction restraining a "religious" viewpoint necessarily asks, "what is religious?" It is beyond dispute that Americans live in a religiously pluralistic society. Therefore, what may not be religious to one individual may be religious to another. Indeed, many religions refer to God differently. For the Islamic, God is "Allah", while for the Buddhist, God is "Buddha." Those of the animist religion believe God resides in certain animals while those of the New Age persuasion believe God resides in and around us like a "force." Secular Humanism, which this Court has defined as a religion, *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.3 (1961), believes that humans are God. Courts have recognized this plurality of religion. *See O'Hair v. Andrus*, 613 F.2d 931, 935 n.19 (D.C. Cir. 1979). It is clear that granting an injunction proscribing "religious" speech would necessarily fail for want of a clear definition of the viewpoint. Is, "May the Force be with you," religious? This type of viewpoint-based restriction would be unduly broad in its scope. The student speech at issue in this case is student-initiated without any oversight by the Board. Student speech is constitutionally protected even in a non-public forum. An injunction requiring censorship of a religious viewpoint is clearly unconstitutional, even in a non-public forum.

CONCLUSION

For the foregoing reasons, this Court should deny the Writ. If this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

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No. 01-287

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY

The briefs in opposition, in one way or another, concede that the issue presented in the Petition for Writ of Certiorari is important and has spawned substantial litigation yielding a patchwork of results in the circuits. The very division of the *en banc* Eleventh Circuit in this case speaks to both the importance and interpretive divisions in the courts of appeals. Furthermore, the bulk of the arguments made in the briefs in opposition are directed at the asserted distinguishability of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), from this case and defense of the Eleventh Circuit's judgment, matters more properly considered in review on the merits, as opposed to this Court's threshold determination of whether to grant review. The apparent conflicts among the courts of appeals and of the judgment below with this Court's decision in *Santa Fe* warrants the Court's review in this case.

With respect to the record, the respondents significantly do not take issue with the fact that the "Graduation Prayers" policy has resulted in at least 62 messages reflected in programs pre-printed by the respondents, 58 of which messages were entitled "invocation" or "Benediction," or were delivered by a student "chaplain," or both, between 1994 and 1998. The record demonstrates, by the very use of these terms specifically descriptive of religious expression and the title of a religious officer in these pre-printed programs (tabulated at App. 262a-266a), that respondents are aware in advance of the intended religious nature of the speech resulting from the policy. *See Santa Fe*, 530 U.S. at 306-07 & n.19 ("invocation" is "term that primarily describes an appeal for divine assistance"). Respondents, therefore, are no more disentangled from the religious messages resulting from the policy than was the Santa Fe Independent School District.

The policy itself provides that the "senior class as a whole" decides the "messenger," App. 267a-268a, and the respondents can identify no manner in which this determination is made other than by majority or plurality

vote.[1] In fact, even in the face of litigation over the policy since 1993, the record includes, for example, a ballot for one high school's class of 1998, which listed candidates for class "chaplain" and then posed two questions: "PRAYER AT GRADUATION: 1. Yes. 2. No," and "DO YOU WANT THE CLASS CHAPLAIN TO READ THE PRAYER?" Exh. 51 at 7. The record also reflects other plebiscites specifically on the question of prayer at graduations. App. 127a & n.15; *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1102 & n.15 (11th Cir. 2000) *(en banc) (Adler IV)* (Kravitch, J., dissenting).

Respondents' knowledge that their "Graduation Prayers" policy has and will result precisely in "graduation prayers," as established by the record, renders the facts of this case similar to *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1228, 149 L.Ed.2d 138 (2001). In light of the record, the Eleventh Circuit's judgment in this case conflicts with the Ninth Circuit's decision in *Cole*.[2] Squarely contrary to the judgment of the Eleventh Circuit in this case, the Ninth Circuit in *Cole* concluded that "allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious practices." *Cole*, 228 F.3d at 1104. The putative intervenors acknowledge the inconsistency of *Cole* with the judgment of the Eleventh Circuit in this case.

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[1] Superintendent Zenke's deposition testimony was accurately quoted at page 3 of the Petition, although the Petition mistakenly cited to pages 10-11, rather than the correct citation to page 9, of his deposition.

[2] The putative "respondents-intervenors," who would appear simply to be *amici* in this Court, characterize *Cole* as "merely an aberration." However, *Cole* is the law of the Ninth Circuit because that court's two previous decisions most closely on point were subsequently vacated. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated*, 177 F.3d 789 (9th Cir. 1999) *(en banc)*.

Furthermore, both the Respondents and the putative intervenors conspicuously ignore the circuit conflict resulting from the Eleventh Circuit's explicit rejection in this case of the reasoning and decision of the Fifth Circuit on the issue of prayer at graduation in *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 819 (5th Cir. 1999), which holding this Court declined to review. *See* App. 70a-72a, n.7; *Adler IV*, 206 F.3d at 1079, n.7.

Arguments in opposition to the petition also seek to mischaracterize this case as one involving free speech or equal access. However, no court other than the district court in this case has ever actually held that a public high school graduation exercise is a public forum. *See* Petition at 11. The issue presented relates to a state policy regarding prayer at a highly controlled school function on school-controlled property utilizing a school microphone, *see Lee v. Weisman*, 505 U.S. 577, 592-94, 599 (1992), not an issue related to mere use of school facilities outside of the times for school functions. The graduation ceremony microphone is not equally open to all.

The record and the face of the policy belie Respondents' contention that the "Graduation Prayers" policy is all about free speech and allowing students to direct their own graduation ceremonies.

> The policy is not entitled "Student Messages" or "Student Participation in Graduation," but "Graduation Prayers." There is nothing about a general student message or student participation that would cause the school board to dictate that it come at the beginning or end of the ceremony; that is, however, exactly when prayer traditionally occurs in a ceremony. And the board's mandate that the student "message" be no longer than two minutes comports nicely with the length of a good, short prayer. The memorandum that became the board's policy refers repeatedly not to free speech or democratic participation cases but to a school prayer decision.

App. 47a, *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1350 (11th Cir. 2001) *(Adler V)* (Carnes, J., dissenting).

Additionally, the putative intervenors also argue that the petitioners could not obtain any remedy that would comport with the Constitution. On the contrary, however, petitioners seek, among other things, to enjoin respondents' "Graduation Prayers" policy, which creates actual and perceived state sponsorship and endorsement of religion. Furthermore, the precise contours of an injunctive remedy are more properly developed during review on the merits or in further proceedings below.

The facts of this case are established in the record relating to the graduation ceremonies that occurred in 1993 by judicial notice of the *Adler I* record, as well as the verified complaint pleading facts relating to graduation ceremonies between 1993 and 1997; authenticated copies of dozens of graduation programs and other documents from the years 1994 to 1998; and the affidavit of Karen Adler. *See* App. 135a-137a & nn. 24-31; *Adler IV*, 206 F.3d at 1105-06 & nn. 24-31 (Kravitch, J., dissenting). These record facts are highly probative of the issues of whether respondents' policy has the primary effect of advancing religion and conveys an actual or apparent state endorsement of the religious messages resulting from the policy.

To the extent that respondents seek to distinguish between facial and as-applied challenges, and assert that as-applied claims have been waived, the record refutes the assertion that petitioners waived such a challenge after making such voluminous filings and obtaining judicial notice of the entirety of the record in *Adler I*. App. 134a-138a; *Adler IV*, 206 F.3d at 1104-06 (Kravitch, J., dissenting). The petitioners specifically objected to the loss of opportunity for certain discovery resulting from the district court's consolidation of the trial with the hearing on petitioners'

application for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a)(2). App. 135a & n.25; *Adler IV*, 206 F.3d at 1105 & n.25 (Kravitch, J., dissenting). Accordingly, the record facts are properly before the Court for consideration.

The issue presented is clearly important and recurring throughout the United States, resulting in a multitude of varying judicial decisions. The Court of Appeals turned a veritable blind eye toward the history, context and results of the respondents' "Graduation Prayers" policy, as well as toward this Court's decision in *Santa Fe*. Accordingly, the Court should grant review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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